

THINK BEFORE YOU EMOJI

The doctrine of precedent and the value of s 39(2) of the Constitution

Afrikaans as hof taal:
Should it have a place?
Ukuhlaziya

Review of arbitration awards due to an arbitrator's misconduct

Does the Constitutional Court have plenary (unlimited) appeal jurisdiction?

Resolving divorce disputes through a collaborative process

Real estate mediation –
stop the costs
before they get to court

President Zuma appoints first woman President for the SCA

Practice management:
Leave no doubts in your client's mind





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16 Think before you emoji

Emoji are the language of our online era, the thumbs-up to a question, the wink to our wit and we send emoji to improve on, even expand, our words and bring emotion – affection, frustration, love, anger – to the conversation. Now, like the tweets, posts, and texts that are a crucial part of the way we communicate today, emoji, and their brethren emoticons, have finally gotten their due in court. **Tshepo Confidence Mashile** discusses international case law and how South African courts are yet to be confronted with the use of emoji and emoticons as evidence, this aspect has precedent in the international community.

18 Afrikaans as hoftaal: Should it have a place? Ukuhlaziya

In this article **Bouwer van Niekerk** asks: What makes Afrikaans so special that it, together with English, should be the languages of our legal system? Mr van Niekerk writes that Afrikaans is the language he grew up in, the language in which he learnt how to read and write and the language in which he thinks. However, he wonders, whether in 2017, Afrikaans should still have a place as a generally accepted language..

22 Resolving divorce disputes through a collaborative process

In order to minimise litigation within the magistrate's courts, government launched the Court-Annexed Mediation Rules, which are meant to encourage disputants to voluntarily submit themselves to mediation of disputes prior to commencement of litigation in the magistrate's courts. Established jurisdictions such as United States, Canada and Australia have for decades considered the use of another alternative dispute resolution in divorce matters known as collaborative law. **Clement Marumoagae** discusses the possibility of adoption of collaborative law in South Africa (SA), and assesses whether this form of alternative dispute resolution is likely to be practiced successfully in SA.

24 Real estate mediation – stop the costs before they get to court

In a South African context, one has to consider the nature of the real estate. Commercial real estate disputes create limited legislative hurdles for parties, such as the Consumer Protection Act 68 of 2008 (CPA) (if applicable), whereas the residential arena contains more onerous legislation, such as the Rental Housing Act 50 of 1999 (as amended), the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 and the CPA. Compliance with the aforesaid Acts are normally adjudicated pursuant to litigation, which is costly and may affect the value of rental space and the respective parties' interests at conclusion thereof. Mediation is an alternative basis for resolving disputes, and in this article, **Craig Berg** focusses on the value and advantages of mediation in commercial and residential real estate disputes.

28 The doctrine of precedent and the value of s 39(2) of the Constitution

The principle of *stare decisis* is a juridical command to the courts to respect decision already made in a given area of the law. The practical application of the principle of *stare decisis* is that courts are bound by their previous judicial decisions, as well as decisions of the courts superior to them. In other words a court must follow the decisions of the courts superior to it even if such decisions are clearly wrong. **Bayethe Maswazi** examines whether a court in a given scenario is bound by the principle of *stare decisis* in circumstances where it deals with the decision or precedent set by a court superior to it, particularly, if the latter has interpreted a particular legislative provision in a manner which plainly does not accord with the command or the constitutional directive contained in s 39(2) of the Constitution. He further examines the relationship between s 39(2) of the Constitution and the doctrine of precedent with a view to determine the extent to which courts have solved the possible conflict between the two.

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Future of the LSSA discussed

On 16 March, councillors of the Law Society of South Africa (LSSA) attended a special council meeting to discuss the role of the organisation post the full enactment of the Legal Practice Act 28 of 2014 (LPA). The meeting was also attended by representatives of the National Forum on the Legal Profession, the Attorneys Fidelity Fund and the National Executive Council of the Black Lawyers Association (BLA). The aim of the meeting was to answer one question: Should the LSSA continue its functions as a transitional organisation post the LPA?

During the preceding months of the 16 March meeting, the Co-chairpersons of the LSSA consulted with various law societies to discuss the future of the LSSA. According to the Co-chairpersons, during their consultations, the Cape Law Society said that the LSSA should continue for the next ten years while the other provincial law societies agreed that the LSSA should continue in a transitional role. The BLA raised an objection that the Co-chairpersons consulted other constituent members of the LSSA, while the BLA was not afforded the same opportunity.

During the special meeting, the Co-chairpersons tabled a proposal that the LSSA should continue for at least three years from 1 January 2018. The Co-chairpersons highlighted the fact that the functions performed by the LSSA cannot disappear because the legal profession would stand to lose.

Functions of the LSSA

If the LSSA ceases to exist and no other organisation takes on the below functions, this is what the profession stands to lose.

The LSSA has three support departments, namely, finance, human resources and communication. Other departments are:

Legal Education and Development (LEAD)

For attorneys, LEAD conducts –

- courses in conveyancing and notarial practice;

- seminars and workshops on a wide range of legal developments;
- practice management courses;
- postgraduate certificates;
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- mentoring and leadership; and
- e-LEADer e-learning.

For candidate attorneys, LEAD conducts courses at its ten centres of the School for Legal Practice and e-LEADer e-learning.

Other services rendered by LEAD include –

- course design and implementation for the legal profession and also for outside stakeholders;
- drafting of admission examination papers;
- data service and statistics;
- job-search programme for candidate attorneys;
- liaison with educational institutions;
- e-learning development;
- material development; and
- support staff and corporate training.

Professional Affairs

The Professional Affairs department coordinates and supports the activities and representations of LSSA specialist committees. The committee members are practising attorneys and experts in their fields of practice. The department initiates and comments on issues and legislation that affect the legal profession and the public (for example, the *Proxi Smart* matter see 2016 (Dec) DR 3). The department also liaises with Parliament and stakeholders and coordinates special projects.

De Rebus

De Rebus has been the South African Attorneys' Journal published 11 times a year by the LSSA, for the last sixty years. It is distributed to all practising and candidate attorneys free of charge, and is also sent to other stakeholders, as well as to paying subscribers. Its content is invaluable to the profession.

Outcome of 16 March meeting

The BLA noted that it needed to consult with its members in order to answer the question whether the LSSA should continue its functions as a transitional organisation post the LPA. Once the BLA has consulted with its members, it will then answer the question at the next LSSA annual general meeting, which will be held on 21 – 22 April. The BLA had, on 4 February, resolved not to take part in the formation of the professional interest organisation (see 'A new home for legal practitioners: What's in it for you?' 2016 (Nov) DR 3).



Mapula Sedutla – Editor

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Would you like to write for *De Rebus*?

De Rebus welcomes article contributions in all 11 official languages, especially from legal practitioners. Practitioners and others who wish to submit feature articles, practice notes, case notes, opinion pieces and letters can e-mail their contributions to derebus@derebus.org.za.

The decision on whether to publish a particular submission is that of the *De Rebus* Editorial Committee, whose decision is final. In general, contributions should be useful or of interest to practising attorneys and must be original and not published elsewhere. For more information, see the 'Guidelines for articles in *De Rebus*' on our website (www.derebus.org.za).

- Please note that the word limit is 2000 words.

- Upcoming deadlines for article submissions: 18 April and 22 May 2017.

Attorneys Development Fund seeks to help more attorneys

The incoming Vice Chairperson of the Attorneys Development Fund (ADF), Mimie Memka, said word must be spread that there is an organisation that is available to assist attorneys grow in their career. She said that although the ADF has been in existence for seven years, not many practitioners know that it exists. Ms Memka was speaking at the ADF's annual general meeting (AGM) held at Emperors Palace in February.

Ms Memka said despite the efforts of board members trying to market the ADF in their respective areas, their efforts have become insufficient. She said that the organisation relied on their partners (ie, the Attorneys Fidelity Fund, Black Lawyers Association, Cape Law Society, Free State Law Society, KwaZulu-Natal Law Society, Law Society of the Northern Provinces and Law Society of South Africa) to point all the newly appointed and older attorneys, who have been in



Attorneys Development Fund Vice Chairperson Mimie Memka and the newly appointed Chairperson, Nomahlubi Khwinana, at the organisation's annual general meeting.



Attorneys Development Fund (ADF) operational manager, Mackenzie Mukansi speaking at the organisation's annual general meeting in February.

practice and might want to branch out into other areas of law, into the ADF's direction.

The operational manager of the ADF, Mackenzie Mukansi, said the mission and vision of the organisation is still fairly the same, however, the organisation will have some changes in 2017. He added that there will be engagements with the ADF's stakeholders to find out what is expected of the organisation, so that the organisation can focus on those specific needs.

Mr Mukansi pointed out that the ADF is a business development organisation and said the organisation's day to day work includes visiting attorneys that they have helped, to see how they are doing. He added that the organisation had a project where it gave information sessions to attorneys and said the project was held in Mthatha in the Eastern Cape last year with the help of LexisNexis.

Mr Mukansi announced that the next information sessions for attorneys will be held in Mpumalanga and another in Northern KwaZulu-Natal later in the year. Mr Mukansi encouraged attorneys to attend the sessions.

After the AGM adjourned, Nomahlubi Khwinana was elected as the new Chairperson for the ADF, the board members of the organisation include -

- Ms Memka as Vice Chairperson;
- Mr Luvuyo Godla;
- Mr Roland Meyer;
- Mr Etienne Horn;
- Mr Gavin McLachlan;
- Mr Tšiu Vincent Matsepe; and
- Mr Dave Bennett.

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President Zuma appoints first woman President for the SCA

President Jacob Zuma has appointed the first woman as President of the Supreme Court of Appeal (SCA). Justice Mandisa Muriel Lindelwa Maya was appointed by President Zuma in terms of s 174(3) of the Constitution.

Justice Maya's appointment follows the discharge from active service of Justice Lex Mpati. In a press release

the Presidency said President Zuma informed the Chairperson of the Judicial Service Commission (JSC), Chief Justice Mogoeng Mogoeng about his decision to nominate Justice Maya as President of the SCA. According to the Constitution, the President of the SCA is appointed by the President after consultation with the JSC.

Justice Maya was appointed as an acting judge in the High Court in 1999 and

fulltime judge the following year. She has acted as a judge at the Labour Court, acting judge at the SCA, and as an acting judge at the Constitutional Court. In 2006 she was appointed judge of the SCA and in 2015 she was appointed the first female Deputy President of the SCA.

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Information Regulator to ensure protection of personal information

Chairperson of the Information Regulator, advocate Pansy Tlakula, said the organisation was established to ensure that personal information is protected and that free flow of information is promoted. In a press release, Ms Tlakula said that the organisation was not the 'POPI Regulator' as some had referred to it.

Ms Tlakula said the mission of the Information Regulator was to ensure that both the constitutionally guaranteed right to access information and the right to privacy are equally protected and enjoyed and that failure to do so might result in one part of the organisation's mandate being given more prominence than the other.

Ms Tlakula said the regulator consists of five members, but said it was worth noting that three members are women and that the chairperson is also a woman. 'That it is something that must never be taken for granted,' she added. Ms Tlakula pointed out that the organisation is currently operating from the Department of Justice and Correctional Services offices in Pretoria and the organisation has taken a strategic decision to use the expertise that they have to do the ground work required to establish the regulator and use consultants where necessary.

Ms Tlakula said this was going to give the office of the regulator an opportunity to learn every aspect of Protection of Personal Information Act 4 of 2013 (POPIA), which by all accounts, is a complex piece of legislation. The first thing the organisation did when it started operating, was to establish the governance

structure of the regulator. Ms Tlakula noted that the committee may consist of the members of the regulator or other members which the regulator may appoint. 'Section 49 of POPIA mandates the regulator to establish one or more committees for the proper performance of its functions,' she added.

Ms Tlakula said that the organisation took into consideration the experience and expertise of members to designate the chairperson of each committee, and the following committees were established -

- policy and governance committee, chaired by the chairperson of the regulator, Ms Tlakula;
- enforcement committee, chaired by attorney Sizwe Snail ka Mtuze as member representing the regulator;
- legal and compliance committee chaired by advocate Lebogang Stroom-Nzama;
- complaints and dispute resolution committee, chaired by professor Tana Pistorius;
- finance risk and ITC governance committee, chaired by advocate Collen Weapond;
- outreach and research committee, chaired by Mr Snail ka Mtuze; and
- the human resource committee, chaired by Mr Weapond.

Ms Tlakula said that only s 39 - 54, s 112 and s 113 of POPIA have come into operation and that the remaining sections will only come into operation once the regulator is fully operational. She said that when the regulator's office took operation in December 2016, there was a brief meeting with officials of the department of justice who were responsible for drafting POPIA. Ms Tlakula said

the officials informed the regulator that it will only be up and running in two years' time. Ms Tlakula said her office is committed to shortening the operations of the regulator.

'We decided to use our collective expertise and experience to produce the zero draft of the Regulations, which will be submitted to the [Office of the Chief State Law Adviser] for refinement and finalisation before we begin with the public consultation process,' Ms Tlakula said. She added that if all goes according to plan, her office intends to table the regulations in Parliament in compliance with s 113(5)(a) before the end of the year.

Ms Tlakula noted that s 114(4) of POPIA requires the regulator to take over function of enforcing Promotion of Access Information Act 2 of 2000 (PAIA) from the South African Human Rights Commission (SAHRC). She said the legal process of doing so is regulated by the subsection read with s 110 of POPIA. 'We have already held the first meeting with the SAHRC on the interpretation of the relevant PAIA and POPIA and subsequent meeting will be held in March this year,' she said.

Ms Tlakula said they had agreed with the SAHRC to enter into a memorandum of understanding to put the relevant sections of the Act to work. She pointed out that the office of the regulator was planning to organise sector specific consultation workshops throughout the country in the near future.

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Judge Moosa remembered for his selfless acts of kindness and human rights work

The office of the Chief Justice of South Africa said the late, retired Judge Essa Moosa, was revered globally for his peace initiatives and his track record as an outstanding human rights activist. In a press release, the office of the Chief Justice said it was saddened and shocked by the passing of a well-respected human rights activist.

The office of the Chief Justice described the struggle icon as a humble servant of the judiciary. The organisation added that Judge Moosa's unquenchable passion for human rights was borne out by a selfless and indefatigable defence of many political activists in matters relating to basic human rights like detention without trial, freedom of expression, freedom of movement, security and emergency legislation and regulations. The office of the Chief Justice pointed out that Judge Moosa acted for many oppressed people including prominent leaders of political and community based organisations, such as former President Nelson Mandela.

Meanwhile, the Council of the Cape Law Society joined countless South Africans in mourning the passing of Judge Moosa. In a press release the organisation said that Judge Moosa was a respected member of the attorneys' profession for more than 40 years and brought his life experience growing up in the District Six under Apartheid to bear his unwavering championing of the principles of equality, freedom and justice.

The Cape Law Society added that Judge Moosa was always willing to assist the poor at great personal cost to himself and his family, often providing *pro bono* legal services to those who could not afford it.

Judge Siraj Desai of the Cape Town Division of the High Court honoured the late Judge Moosa with a tribute. In his tribute letter, Judge Desai said on his first encounter with Judge Moosa, he was battered and bruised and harboured total contempt for Apartheid and its functionaries and was determined to put an end to it. He added that in the 1970's, the 1980's and until freedom was attained, the firm E Moosa and Associates and Judge Moosa became legendary figures in the fight against Apartheid. Judge Desai said the law firm became a refuge for thousands of activists and who were charged or on the run and also a refuge for family members of activist who were detained.

Judge Desai said Judge Moosa served the Bench with distinction for over 13 years. 'It was a privilege to sit with him. He was extremely courteous to all who appeared before him,' Judge Desai said. He pointed out that all the judgments Judge Moosa passed were always moderated by restraint and humanity.

The National Association of Democratic Lawyers (NADEL) said Judge Moosa's death was a great loss to the legal profession and the country. In a press release NADEL said Judge Moosa stood by his people and he would not relinquish

his responsibility to represent their genuine interests and never sought to seek out his own fortune. The organisation said the United Democratic Front (UDF) played an immense role in Judge Moosa's life as a lawyer and an activist.

NADEL said Judge Moosa believed and lived the motto that 'UDF unites and Apartheid divides' and understood the role of international solidarity in any struggle from his own experiences in the struggle against Apartheid, racial oppression and prejudice. The organisation pointed out that it was on this basis that he took an active role in the struggle of the oppressed and marginalised Kurdish people, never as an armchair revolutionary, he took an active role in organising in our country and elsewhere support for the Kurdish people.

Judge Moosa was among the founding members of NADEL. In a press release NADEL said that the founding members gave rise to a new type of lawyer in the profession, namely, 'the activist lawyer'. Judge Moosa practiced as a human rights lawyer for 30 years and was appointed Judge of the Supreme Court in 1998 by the late President Mandela, where he remained until he retired in 2011. He died on 26 February at the age of 81 at his home in Cape Town.

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Free State Judge President extends his condolences after the passing of former Judge President Malherbe

The Judge President of the Free State Division of the High Court, Judge President Mahube Molemela, sent condolences to the family and friends of former Judge President of the Free State Division of the High Court, Judge Jacobus Petrus Malherbe.

The late Judge Malherbe was born in 1938 and passed away in March. He served in various capacities in the public services section as public prosecutor and state advocate before taking up private practice at the Free State Bar in 1965. After acting as a judge at various times between 1981 and 1984, he was permanently ap-

pointed on 1 August 1984 as a judge in the Northern Cape Division of the High Court, and later the Free State Division of the High Court in February 1985.

In April 2001 the late Judge Malherbe was appointed as Judge President of the Free State Division of the High Court, where he stayed until he was discharged from service at the age of 70. Judge President Molemela said Judge Malherbe contributed immensely to the development of the philosophy of law.

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Judge President Mlambo saddened over the death of Judge Roux

In a press release, the Gauteng Division of the High Court said Judge President Dunstan Mlambo was saddened by the news of the passing of Judge Jacobus Pierre Roux. Judge Roux served as a High Court Judge of the Gauteng Division from 1986 until his retirement in 2003. During 1982 and 1983 he was appointed as an acting judge at the then Transvaal Provincial Division of the Supreme Court and in 1986 he was permanently appointed as judge of the same court.

Judge Roux also acted as a judge at the Bophuthatswana High Court Mmabatho in 2002. He was discharged from active service in 2003, at the age of 70 and passed away in March at the age of 84.

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WE'D LIKE TO EXTEND CONGRATULATIONS TO THE WINNER OF THE IP FIRM OF THE YEAR SOUTH AFRICA

The international awards and accolades that are consistently bestowed upon South African IP law firms are surely a testament to the excellence and dominance of our country's fine attorneys – and a celebration of the consummate expertise and insight that our intellectual property professionals are sharing with the continent. Congratulations Mzansi!

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HOTdocs helps boost access to justice

Legal Aid South Africa (Legal Aid SA) has recently rolled out HOTdocs, an automated document assembly software, at its offices nationwide, becoming the first legal aid provider in Africa to utilise such software for this purpose. This software allows the organisation to develop templates for client paperwork, initially for divorce, guardianship and eviction matters. With these templates developed, a form is completed with client information and is then automatically pulled through to other documents needed for the specific matter. This has eliminated manual completion of this paperwork and ensures that all documents fulfil the necessary legal criteria.

The software was launched at the be-

ginning of February and legal practitioners are already noting its time-saving benefits. Comments from civil practitioners around the country include –

- ‘HOTdocs is a great innovation. It makes it so easy to create pleadings’;
- ‘I am amazed at how efficiently HOTdocs allows us to draft documents’;
- ‘This is great. No more typing the same information over and over again’; and
- ‘User friendly, even where there are glitches, we can figure it out’.

Legal Aid SA’s Chief Legal Executive, Patrick Hundermark, spearheaded the acquisition and development of HOTdocs for the organisation. He said: ‘We are excited to integrate HOTdocs into our daily work processes in order to better serve our clients. I am convinced

that this software will have a visible impact on our efficiency and performance. With such a great need for legal aid services in South Africa, we are modelling a sustainable way forward that can be replicated throughout the continent and elsewhere.’

HOTdocs will be made available for further applications in the coming months. Mr Hundermark is confident that the introduction of this software will enable Legal Aid SA to further fulfil its constitutional mandate and ensure that access to justice is made a reality for a significant number of people.

Janeske Botes, Media Content Development Specialist, Legal Aid South Africa

Update on ICMS Web Portal

The Department of Justice and Constitutional Development (DoJ&CD) embarked on a journey to modernise its information technology (IT) systems and in particular, the Civil Case Management System and process. National roll-out commenced in August 2016 and will be completed in May. The drive at the DoJ&CD is focussed at digitisation, improved service delivery to all stakeholders and ultimately access to justice for all.

The DoJ&CD is cognisant of the challenges experienced by members of the legal profession, as well as the ever-increasing civil litigation, which in itself strains the resources available. In order to evaluate the functionality and usability of the envisaged portal, as well as meet practitioners’ needs. The first phase of the web portal will be piloted in two courts in the Limpopo and Mpumalanga provinces.

A handful of attorneys will be approached to be a part of the pilot in each of the provinces mentioned above. This will be done in consultation with the

court officials based on the volumes received from the firms. The department wishes to test the following functions –

- ability to download orders granted;
- view the status of cases before court; and
- download cases enrolled as diary items to any electronic diary or calendar.

Once the department is satisfied, the DoJ&CD envisages that the web portal will be enabled for the rest of the provinces and attorneys will be able to log in and use the portal.

The web portal does not require a registration fee. It is provided free-of-charge by the DoJ&CD as a value-added service to the legal profession and is funded from its budget. It is not mandatory to use the portal, however, the DoJ&CD would welcome increased use of the portal to retrieve orders instead of physical attendance at court to uplift the same.

The DoJ&CD has undertaken to confirm the details of all firms and attorneys with the respective provincial law societies, as well as preserve confidentiality not only of the attorney and firm details, but will also ensure that the ac-

cess to the cases before court is limited to the specific attorney registered as the attorney on record.

In addition to the functionality mentioned previously, the DoJ&CD intends to complete the following development as the next system enhancement –

- scanning/uploading of served processes, heads of argument and any other documents to case files;
- registration of new cases and receipt of case numbers from the portal; and
- ability to review attorney and/or firm details.

The department has consulted with the Law Society of South Africa, as well as representatives of the provincial law societies where the web portal and the modernised Civil Case Management System were unveiled. A Memorandum of Understanding will be concluded in due course to cement this relationship.

Dharmita Ramluckun, Senior Business Analyst, Department of Justice and Constitutional Development.

Do you have something that you would like to share with the readers of *De Rebus*?

Then write to us. *De Rebus* welcomes letters of 500 words or less.

Letters that are considered by the Editorial Committee deal with topical and relevant issues that have a direct impact on the profession and on the public.

Send your letter to: derebus@derebus.org.za

LSSA and GCB meet on crucial issues in the profession

The Co-chairpersons and Management Committee (Manco) members of the LSSA met with General Council of the Bar (GCB) Chairperson, Vuyani Ngalwana SC and Craig Watt-Pringle SC, early in March in the first of what is expected to be regular meetings during this crucial time for the legal profession. Discussions focused on various issues facing the legal profession as a result of the imminent implementation of the Legal Practice Act 24 of 2014, in 2018. These included the implications of s 35 of Act, which deals with fees and the requirement for cost estimates to clients, including at every stage of the litigation process. This would not only affect attorneys and advocates with trust accounts in the future dispensation, but also all advocates, including how their fees would be determined.

The GCB raised the issue of late payment of advocates' fees by attorneys and the impact particularly on junior advocates at the Bar. From the side of the LSSA, concern was raised at the defaulters' list by the Bar and the far-reaching consequences that has for attorneys.

Other aspects that were discussed



Representatives of the LSSA and GCB at a meeting in March, included, standing: Craig Watt-Pringle SC; LSSA Co-chairperson Mvuzo Notyesi; GCB Chairperson, Vuyani Ngalwana SC and LSSA Co-chairperson Jan van Rensburg. Seated: LSSA Manco members Richard Scott, Nolukhanyiso Gcilitshana, Nkosana Francois Mvundlela, David Bekker and Ettienne Barnard.

included current legal education issues and legal education in the future dispensation for the profession, although this is being dealt with by a sub-committee of the National Forum on the Legal Profession.

It was agreed that the LSSA and GCB would meet regularly, with the next

meeting set for 8 May, to ensure ongoing channels of communication and possible cooperation between the two branches of the profession.

*Barbara Whittle,
Communication Manager, Law Society of
South Africa, barbara@lssa.org.za*

LSSA says unconstitutional elements in Draft Liquor Amendment Bill can lead to closure of business premises

The Law Society of South Africa (LSSA) made a number of submissions on proposed legislation, one of them being the Draft Liquor Amendment Bill, 2016 (the Bill).

In the submission made at the end of last year, the LSSA stated that it had considered the proposed amendments contained in the Bill, which proposes amendments to the existing Liquor Act 59 of 2003 and is of the view that, should the Bill, be promulgated in its current format, to impose provisions on the retail sale of liquor, such content will be unconstitutional.

In the submission, the LSSA stated that 'all retail liquor stores, hotels, guest houses and restaurants in South Africa will close for the simple reason that al-

most all such business premises are within 500 metres from schools, places of worship, recreational facilities, rehabilitation or treatment centers, residential areas and public institutions and other like amenities. Sporting clubs, being recreational amenities, will not be able to be licensed. All tavern operators will be required to close their businesses.'

The LSSA questioned what the position would be if a church or school, for example, opened its doors within the prescribed 500 metres from an existing registrant. 'Does this mean that the registrant must now relocate? Churches and private schools are mushrooming all over the country, establishing their facilities in business areas close to where people work.'

Issues to be addressed

In its submissions, the LSSA suggested that a few issues needed to be addressed, such as: 'Section 1: The section is amended by the insertion of the definition of a "place of worship". It is defined as "meaning a specially designed structure or consecrated space where in individuals or a group of people come to perform acts of devotion or religious services".'

The LSSA is of the view that the definition is problematic because, in terms of the new s 13A, the manufacture, distribution or retail sale of liquor is prohibited within 500 metres from a place of worship. The LSSA stated that, 'as the definition stands now, it is not clear whether it applies to occasional religious services or to regular services. Where

“individuals” perform “acts of devotion” in their homes or elsewhere will it make the homes or other places, places of worship.’

The LSSA added that the Bill prohibits the advertisement of liquor ‘in public platforms’ in the following (but not limited to) forms: Billboards less than 100 metres from junctions; street corners or traffic circles; distribution of pamphlets containing liquor adverts; radio and television advertising except in prescribed time slots; and that adverts must reflect the harmful effect of liquor abuse. The LSSA noted: ‘In addition, the Minister may after consultation prescribe more restrictions. This is unacceptable as it gives the Minister the power to restrict advertising severely or to ban it completely. These restrictions, especially the one relating to pamphlets, will seriously hamper new entrants to the liquor trade. How will the public even know that a new licensee is open for business? The result is that the established licensees will be protected from legitimate competition.’

Additionally, the sale of liquor to minors is substituted by ‘persons under the age of 21’. The LSSA is of the view

that ‘legally, a 20-year-old is no longer a minor as minority ends on attaining the age of 18. The person is allowed to marry without parental consent, to vote and to enter into contracts unassisted. The age limit set in the Bill is an arbitrary one and is irrational. These provisions will be very difficult to enforce. It is common cause that, despite the 18 year age limit having been in force for many years, underage drinking is rife and that the authorities are unable to enforce the law. There is no reason to suppose that enforcement agencies will have more success by arbitrarily raising the drinking age thereby expecting adult university students and working class men and women to abstain from alcohol. The prohibition will simply be ignored and the authorities will be unable to do anything about it – this in turn will lead to further disrespect for the law which is currently an “epidemic” in South Africa.’

The LSSA concluded its submissions by stating that it is clear from the contents of the Draft Liquor Amendment Bill that it attempts to address some of the issues raised in the Final National Liquor Policy, 2016, but unfortunately the

result of these amendments would not achieve the desired outcome.

The LSSA stated that the real issue is to educate not only those who consume liquor, but also the liquor traders and those responsible for the enforcement of the provisions of the Act, which includes the South African Police Service, liquor inspectors, liquor boards, etcetera, because it is of the view that those responsible for the enforcement of the liquor laws do not have the necessary knowledge of the liquor laws to enforce it properly.

The LSSA also offered to engage the decision makers on the drafting of liquor legislation with a view that such legislation must be in accordance with the Constitution and would provide adequate protection and control relating to the regulation of liquor as a harmful product.

Nomfundo Manyathi-Jele, Communications Officer, Law Society of South Africa, nomfundom@lssa.org.za

LSSA Significant Leadership™ Programme for women lawyers: Cape Town and Durban

The Law Society of South Africa’s empowerment and networking programme for women attorneys – the Significant Leadership™ Programme for Experienced Women Lawyers – will be held in Cape Town and Durban this year. Successful sessions of the programme were held in Johannesburg in 2015 and 2016, and also in Durban last year. The programme specifically focuses on the attorneys’ profession and its unique business models. The speakers will provide guidance to –

- grow a law firm or further one’s career in the legal profession;
- identify niche leadership qualities by completing the internationally acclaimed Belbin report; and
- use professional strengths to achieve better results.

The programme will take place on the following dates:

Cape Town

Session 1: 25 and 26 May 2017

Session 2: 20 and 21 July 2017

Durban

Session 1: 29 and 30 May 2017

Session 2: 14 and 15 August 2017



The sessions will include networking events.

The participation deadline is 24 April. For more information see www.LSSA.org.za or e-mail Dr Jeanne-Mari Retief at retiefj@calibrics.com

Nomfundo Manyathi-Jele, Communications Officer, Law Society of South Africa, nomfundom@lssa.org.za

Judicial Matters Amendment Bill

The Law Society of South Africa (LSSA) submitted comment on the Judicial Matters Amendment Bill B14 of 2016, stating that it has 'serious reservations' regarding the proposed amendment of s 103 of the Administration of Estates Act 66 of 1965 (clause 6 of the Bill), which would give the Minister the power to make regulations as to who would be competent to administer deceased and insolvent estates.

Other LSSA comments

Other legislation that the LSSA commented on recently includes –

- the Courts of Law Amendment Bill B8 of 2016 and the Judicial Matters Amendment Bill;
- comments to the Rules Board on the Harmonisation of the Taxation Process in Magistrates' Courts Rule 33 with Uniform Rule 70 (3B) and (4);
- Uniform Rule 70 and Table A of Annexure 2 to the Magistrates' Courts Rules;

Harmonisation of Taxation Fees; and

- Uniform Rule 68(5)(c)(iv) and Item 14(a) of Table C of Annexure 2 to the Magistrates' Courts Rules.

All the LSSA submissions can be viewed at www.LSSA.org.za under 'Our initiatives', 'Advocacy', 'Comments on legislation'.

Nomfundo Manyathi-Jele, Communications Officer, Law Society of South Africa, nomfundom@lssa.org.za

Conveyancing examination syllabus

If you are writing the conveyancing exam on 10 May you may want to view the syllabus. The syllabus gives information on the examination criteria and pass rate, as well as the Acts that you need to know for the exam.

For the full syllabus see the 'Professional examinations' section on the Law

Society of South Africa's website at www.LSSA.org.za.

The dates of the other exams are:

- **Admission examination:**
– 22 & 23 August
- **Conveyancing examination:**
– 10 May
– 6 September
- **Notarial examination:**

- 7 June
- 11 October

Registration for the examination must be done with the relevant provincial law society.

Nomfundo Manyathi-Jele, Communications Officer, Law Society of South Africa, nomfundom@lssa.org.za



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The following conditions apply to entries:

The article should not exceed 2 000 words in length and should also comply with the other guidelines for the publication of articles in *De Rebus*.

- The article must be published between 1 January 2017 and 31 December 2017.
- The Editorial Committee of *De Rebus* will consider contribution for the prize and make the award. All contributions that qualify, with the exception of those attached to the Editorial Committee or staff of *De Rebus*, will be considered.
- The Editorial Committee's decision will be final.

Any question or correspondence should be addressed to:

The Editor, *De Rebus*, P O Box 36 626, Menlo Park, 002.

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People and practices

Compiled by Shireen Mahomed

Please note, in future issues, five or more people featured from one firm, in the same area, will have to submit a group photo. Please also note that *De Rebus* does not include candidate attorneys in this column.

Von Seidels in Cape Town celebrated its tenth anniversary and has four promotions.



Gunther Roland has been promoted as a partner in the patent department.



Claire Brown has been promoted as a partner in the trade mark department.



Hugo Prinsloo has been promoted as a partner in the trade mark department.



Llewellyn Du Toit has been promoted as a partner in the patent department.

Oosthuizen & Co has three new appointments.



Michael Meyer has been appointed as an associate in Cape Town.



Raynelle White has been appointed as a director in Paarl.



Johannes Loubser has been appointed as a director in Stellenbosch.

Bisset Boehmke McBlain in Cape town has two new appointments



Ronel Els has been appointed as a partner in the conveyancing department.



Nevashni Moodley has been appointed as a senior associate in the litigation department.



Livingston Leandy Inc in LaLucia Ridge, Durban, has appointed Subashnee Moodley as the Managing Director. She specialises in property law and attends to a wide range of property related transactions.



Jurgens Bekker Attorneys in Johannesburg has appointed Tiana Van Der Meer as a junior associate.

All People and practices submissions are converted to the *De Rebus* house style.

Advertise for free in the People and practices column. E-mail: shireen@derebus.org.za



By
Derek
Harms SC

Does the Constitutional Court have plenary (unlimited) appeal jurisdiction?

As editor of Harms DR *Civil Procedure in the Superior Courts* (Durban: LexisNexis), I was recently told by a subscriber that the publication did not consider ‘the consequences of 17th Amendment to the Constitution, 1996, granting the Constitutional Court plenary appeal jurisdiction, have still not been considered throughout the commentary. This amendment means, importantly, that a “constitutional issue” is no longer a jurisdictional requirement for an application for leave to appeal to the Constitutional Court.’

The subscriber was of course referring to s 167(3) of the Constitution, which now (after the amendment with effect from 23 August 2013) reads as follows:

‘(3) The Constitutional Court
(a) is the highest court of the Republic; and
(b) may decide—
(i) *constitutional matters*; and
(ii) *any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court*; and
(c) makes the final decision whether a matter is within its jurisdiction’ (my italics).

Section 167(3)(b)(i) – ‘constitutional matters’

It is accepted, obviously, that the Constitutional Court (CC) is the highest court in South Africa (SA) and may decide constitutional matters.

Ngcobo J in *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) paras 293 – 299 in dealing with the jurisdictional relationship between the Supreme Court of Appeal (SCA) and the CC (prior to the 17th Amendment) held that the CC ‘is not just another court to which an appeal from the [SCA] lies. [The CC] has a special role to play in the context of our judicial system. It is the highest court, not in all matters, but in constitutional matters only’ (not that this dictum was always followed as is evident below).

Be that as it may, the 17th Amendment

changed this by way of Parliamentary interference.

Section 167(3)(b)(ii) – ‘any other matter’

The simple difficulty with the plenary jurisdiction argument is that it avoids the most important word in s 167(3)(b)(ii) viz ‘if’.

Conditional clause

The use of the word ‘if’ is to introduce a conditional clause. In other words a party availing itself of the wording ‘any other matter’ in order to argue any unconstitutional matter it ought to be satisfying the ‘if’ first.

The conditional clause in this section introduces two conditions, which must be present if the CC were to consider the grant of leave to appeal in a non-constitutional matter: ‘The matter raises an arguable point of law’ of ‘general public importance which ought to be considered’.

This obviously voids the plenary jurisdiction argument.

Section 167(3)(b)(ii) received consideration in *Paulsen and Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC).

In sum, the CC found that:

- Arguable point of law – ‘in order to be arguable, a point of law must have some prospects of success’. ‘Ultimately, whether a point of law is arguable, depends on the particular circumstances of each case’.
- General public importance – ‘a “matter of general public importance warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: Its impacts and consequences are substantial, broad-based, transcending the litigation-interests of the parties, and bearing up on the public interest.” This does not mean the requirement will be met only if the interests of society as a whole are implicated. English courts have found that an issue is of general public importance when it is likely to arise again in other cases and where its determination would affect a large class of persons rather than merely the litigants.’

CC – before the introduction of s 167(3)(b)(ii)

Note that the court in the past, before the advent of the section under discussion, ventured past its jurisdictional confines defined in the *Lufuno Mphaphuli* matter, as being ‘in constitutional matters only’ with some or other excuse.

An example, one of many, is *Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC) where the court stated at para 23: ‘The issue relates primarily to the approach adopted by the Supreme Court of Appeal to the question of causation.’ This should have been the end of the inquiry as the Constitution was not in issue.

But, the court went on to say at para 30: ‘This matter falls within the jurisdiction of this court. The applicant sought to vindicate his right to freedom and security of the person under s 12(1) and right to be detained under conditions that are consistent with human dignity, including at least to be provided with adequate accommodation, nutrition and medical treatment under s 35(2)(e) of the Constitution. In addition, based on the state’s inherent constitutional obligations, the constitutional norms of accountability and responsiveness are, in my view, implicated.’ And at para 31: ‘The matter is of importance, not only to the parties, but also to other inmates and the health sector generally. It is thus in the interests of justice that leave to appeal should be granted.’

It is fortunate that the jurisdiction of the Constitutional Court has been changed (ie, by the 17th Amendment) and that it is no longer necessary for it to justify its decision to regard a matter as constitutional in such terms. The CC does not have unlimited jurisdiction, because of the conditional clause in s 167(3)(b)(ii).

Derek Harms SC BA LLB (Unisa) DIP (London) is senior counsel at the Cape Bar.

By the Risk
Management
and
Prosecutions
Unit of the
Attorneys
Fidelity Fund

Leave no doubts in your client's mind

Have you ever sat back and asked yourself if you are an attorney or a service provider or both? You know that you have satisfied all requirements, and you are a practitioner and a professional, but is that all?

An attorney is responsible for representing his or her clients in a legal environment. This can take many forms, from defending them in a courtroom to simply advising them during legal transactions.

If you have decided to practise for your own account, you are running a business. You are, therefore, not just an attorney any longer, but, also a businessperson, a service provider. Business comes with its own challenges, and these you cannot ignore. Effectively, you are a professional running a business. As a professional, there are standards to uphold and codes by which you are required to abide. These codes cannot and should not be overlooked. You operate in a highly legislated environment, and compliance is of utmost importance. As a businessperson, you are operating in a competitive space and should remain competitive in order to survive. Do you sometimes feel that legislation and/or regulation of the profession hinders your ability to generate profits? Do you sometimes struggle to strike a balance between your profession and running a successful business? This article seeks to lessen the burden by showing you how you can remain professional while running a successful business.

Legislative environment

Attorneys in South Africa are currently legislated through the Attorneys Act 53 of 1979. The profession was, until 29 February 2016, regulated through the rules issued by the various provincial law societies. Effective from the 1 March 2016, the Uniform Rules (the rules) came into place to regulate the profession nationally, replacing the then rules of the various provincial law societies (see GenN2 GG39740/26-2-2016).

Section 78 of the Attorneys Act deals with trust accounts, while r 35 of Part V of the rules deals with accounting rules pertaining to trust accounts. Practitioners should always consider and comply with the requirements of the prescripts in doing their work.

Running a business

Everyone who ventures into business has the ultimate goal and/or objective to generate income, and maintain or improve the income levels. Running a business is a means to providing for oneself and dependants. One may be overly eager to reach particular income levels in a very short space of time, resulting in compromise of certain prescripts, and such actions are short-lived with dire consequences.

At the core of running a successful business is client service. Client service goes beyond just the core legal service provided, which you are an expert at, but includes the soft skills that go with the service provided. This article will mainly focus on the soft skills of running a business. Good client service helps you retain your clients and generate perpetuated income. It also helps with introduction of new clients by existing clients. As Chip Bell once said, '... loyal customers are a different breed. They don't just come back, they don't simply recommend you, they insist that their friends do business with you' (Chip R Bell *Customer Loyalty Guaranteed: Create, Lead, and Sustain Remarkable Customer Service* (Adams Media 2007)).

We now look at some of the elements of client service as it applies to a practitioner's environment.

Understanding client expectations

When a client goes to a practitioner for a legal service, the client already has preconceived expectations. Your first contact or meeting with the client is crucial. The impression created at that meeting has long lasting effects.

- It is important that as a practitioner you fully understand the instruction or the mandate from the client. You should document and reaffirm the instruction with the client to avoid any potential misunderstanding.
- It is also important to understand what service the client expects to receive from you. As part of understanding the client's expectations, it is crucial that you explain your obligations in terms of the mandate and your client's obligations. You should also explain the process to your client, the procedures involved, the possibilities, and the impact those pos-

sibilities may have on the service rendered, and any financial implications posed by those possibilities. Using the client's explanation of the issue and your expertise for which the legal service is required, take the client through how you will go about executing the mandate, and how and when you may require the client's involvement. Communicate potential timelines that may be involved, as well as what can possibly change those timelines.

- It is in your client's interest to have an understanding of the financial impact of the service you will be rendering. Inform your client of your tariffs upfront, how and when you expect payment, what reference the client should use when making a payment, etcetera. This will set your engagement boundaries from the beginning, provide clarity to your client and minimise possibilities of chasing after your client for payment.
- Provide your client with your banking details to use when making a payment into your account. Should this be a trust account, the provincial law society should have knowledge of the account.
- After the meeting with your client, provide your client with a documented summary of your discussion and your understanding of your mandate. As part of that confirmation, state what the mandate entails and what it does not entail.

Client first

You must open a client file for each client. The firm must receipt all money paid in by the client, including money paid directly into the bank account or via Electronic Funds Transfer. The details that you must reflect on the record of receipt are the amount received, from whom and when it was received, for which matter and the purpose of the receipt. The firm must maintain an updated record of all monetary transactions at all times, for each client, and on aggregate.

Your client is an important stakeholder to you. It is important that as you provide the service to your client, you maintain close contact with the client on pertinent issues. Do not make a mistake that the client has mandated you, and therefore run alone leaving the client behind, not knowing what is happening. Keep your client informed of all achieved milestones and developments. When you need to consult with the client for a par-

ticular decision, make contact with the client and do not conclude on your client's behalf, this consultation includes transferring money from one account to another where a client has more than one matter that you are handling.

Should the matter carry on for longer than initially anticipated, inform your client of that fact and provide reasons or explanations for the delays, but do not give excuses. As soon as it becomes clear that the matter will carry on, and the client has made a significant deposit into your trust account, and you deem it to be in the client's interest to invest the client's money, inform the client of that fact, and obtain the mandate from the client to invest his or her money. You need to document and explain the investment mandate to the client, including how and where you will invest the client's money, the administration fee that you will charge on interest earned, and to whom the interest earned will be due.

It is also important that, in line with the rules, you also provide an accounting statement to your client on termination or completion of the mandate. The accounting statement should reflect:

- All money paid in by the client.
- All money paid out to or on behalf of the client.
- All money invested on behalf of the client (where money was invested).

- The interest rate on the investment.
- The actual amount of interest earned over the period of investment.
- The administration fee charged on the interest.
- The balance to be paid out to the client or owing by the client.

Multiple touch points and client feedback

In providing a service to a client, it is important that you do not target to excel in certain areas but in the whole value chain. When clients measure the service, or assess the service they received, they do not necessarily isolate areas but consider their whole encounter. There should, therefore, be no single touch points but multiple touch points.

How you measure quality in the service that you offer is important. While you may believe that you are doing the best for your clients, it is worth your while to check with your clients if they are happy with your service. Obtain feedback from your clients on their encounters with your firm, and encourage them to inform you of areas where your firm did well and where you fell short. The firm should not shelve the received feedback, but should use it to excel where it did well, and improve where it fell short. As Peter Drucker said: "Quality" in a prod-

uct or service is not what the supplier puts in. It is what the customer gets out ...' (Peter F Drucker *Innovation and Entrepreneurship* (Harper Business 2006)).

As a practitioner, you are selling your time. However, you can only continue to sell that time provided someone wants to buy your time.

Conclusion

In conclusion, investing in client service can refuel the firm's performance and improve the income generated. You should always nurture excellent client service because it is one of the most important catalysts to growing your business. Maintaining transparency while dealing with clients, although it can be administratively involved, goes a long way in selling the firm and gaining more clients.

We encourage readers to read this article together with:

- 'Accounting to clients: How transparent are you?' (2014 (Aug) DR 20);
- 'How do you make your money?' (2014 (Dec) DR 18); and
- 'Are you in touch with reality...?' (2016 (Aug) DR 16).

By the Risk Management and Prosecutions Unit of the Attorneys Fidelity Fund in Centurion.



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Think before you emoji

By Tshepo
Confidence
Mashile

The history of emoji (or emojis, if you prefer; either plural form is correct) is short but interesting. In 1982, Scott Fahlman, a computer scientist at Carnegie Mellon University, was frustrated by the limitations of the online bulletin board he and his colleagues were using. The problem? The medium only supported text (the ASCII symbols on the computer terminals of the day), and thus did not always convey the emotional intent of posted messages. Jokes were not landing. Sarcasm and irony flew over heads.

Consequently, Fahlman suggested using what have come to be called emoticons (emotion + icon = emoticon), groupings of ASCII text symbols and punctuation marks that work as a humour or emotional signal. And so adding a colon-dash-close parenthesis (:-)) became the joke marker known as the 'smiley' (SE Fahlman 'Smiley Lore' www.cs.cmu.edu, accessed 6-3-2017).

The idea soon exploded with the emergence of text messaging. The emotional shorthand enriched the language of a very restricted medium. In Japan in 1993, the emoticon took on an entirely different life with the creation of stylized picture versions. These emoji (Japanese for picture + letter) created a new pictograph language. This language now includes, according to communication and linguistics firm Idibon, nearly 1 300 images (L Reaper 'Can emojis be used as evidence in courts?' <http://stories.avvo.com>, accessed 23-2-2017).

Emoji are the language of our online era, the thumbs-up to a question, the wink to our wit. They are a splash of color in black and white communication, conveying things mere words often cannot. We send emoji to improve on, even expand, our words and bring emotion – affection, frustration, love, anger – to the conversation. Now, like the tweets, posts, and texts that are a crucial part of the way we communicate today, emoji, and their brethren emoticons, have finally gotten their due in court. And like everything we love online, it's complicated, kind of. (J Greenberg 'That ;) you type can and will be used against you in a court of law' www.wired.com, accessed 23-2-2017.)

Although South African courts are yet to be confronted with the use of emoji and emoticons as evidence, this aspect has precedent in the international community.



Picture source: Gallo Images/Stock

International cases dealing with use of emoji and emoticons by suspected criminals

The following are examples of cases that confronted international courts regarding the use of emoji and emoticons.

- On 15 January 2016, Osiris Aristy (the defendant) opened up Facebook, posted a photo of a gun and wrote, 'feel like katxhin a body right now'. Later that night, he added, 'N***a run up on me, he gunna get blown down' and followed that with an emoji of a police officer and three gun emoji pointing at it (👮🔫🔫🔫). After an hour, he posted another similar message.

Three days later, the 17-year-old defendant was arrested by the New York Police Department at his home in Brooklyn. According to a criminal complaint, the teen was charged with making a terroristic threat, along with charges of weapon and marijuana possession.

His posts, the complaint argued, constituted a threat against police. They felt intimidated and harassed. They felt that the defendant had caused informants and other New York City police officers to fear for their safety, for public safety, and to suffer alarm and annoyance.

A grand jury decided against indicting the defendant, on charges that he threatened to kill police. The prosecutor who presented the case to the grand jury reported that the panel declined to indict the defendant on the terrorist-threat charge (Greenberg *op cit*).

- In Fairfax, Virginia, a 12-year-old girl faced criminal charges for using gun, bomb, and knife emoji in an Instagram post. It read in part:

Killing 🗡️ 'meet me in the library Tuesday' 🗡️🔪🔪

On 14 December 2015, a resource officer at Lanier Middle School in Fairfax was alerted to the girl's post. The officer began interviewing students and sent an emergency request to obtain the IP ad-

dress of the user associated with the Instagram account. The investigation led to the 12-year-old, who was also a student at Lanier. The girl admitted to authorities that she published the posts in question under the name of another student and was charged with threatening the school and computer harassment.

The threat was regarded as 'not credible', according to a spokesman for Fairfax County schools. While a motive was not shared, the girl's mother said the Instagram posts were responses to bullying. The girl was scheduled to appear in juvenile court on these charges and it is not clear whether the case had been resolved already or not (Greenberg (*op cit*)).

• In England, Justice Peter Jackson sitting in the Queen Elizabeth II Law Courts, Liverpool, in the Family court in the matter of *Lancashire County Council v M & Ors* (Rev 1) [2016] EWFC 9 included a smiley face emoji in an official court judgment involving two troubled children. It is thought to be the first time that a High Court document has adopted an electronic communication symbol.

Justice Jackson made his ruling in the High Court family case in which a recent white British Muslim convert was thought to have tried to take four children – the brother and sister and two much younger children of whom he is the natural father – to Syria.

The man is now serving an 18 year prison sentence after being convicted in a criminal court in July 2016 for firearms offences. The family were stopped in Istanbul and sent back to Lancashire, where the brother and sister were taken into foster care.

The judge used the emoji to explain why he thought the children's mother had been duped into travelling to Turkey, rather than being complicit in the plot. He said police had misinterpreted a message asking a relative to look after the family pets.

Justice Jackson said in his judgment: 'The mother left a message in the caravan for the father's sister, who I will call the aunt. It told her how to look after the family's pets. The message said that the family would be back on 3 August. It has a ☺ beside the date. After the family left, the police searched the caravan. They found the message and say that the ☺ is winking, meaning that the mother knew they wouldn't be coming back. I don't agree that the ☺ is winking. It is just a ☺. The police are wrong about that, and anyhow they didn't find anything else when they searched the caravan.'

• Emoticons landed in the United States (US) Supreme Court in *Elonis v United States* 575 US (2015).

Elonis was in the process of divorce and made a number of public Facebook posts.

He posted the script of a sketch comedy sketch by 'The Whitest Kids U' Know', which originally referenced saying 'I

want to kill the President of the United States', replacing the president with his wife:

'Did you know that it's illegal for me to say I want to kill my wife?

It's illegal.

It's indirect criminal contempt.

It's one of the only sentences that I'm not allowed to say.

Now it was okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife...'

Elonis ended the post with the statement: 'Art is about pushing limits. I'm willing to go to jail for my constitutional rights. Are you?'

At trial, his lawyers argued that the tongue-out emoticon (:-P) signalled that he was joking or engaging in hyperbole just meant to shock. The lawyers asked, unsuccessfully, for a jury instruction that required intent to be considered as part of a 'true threat'. Jury instructions are the set of legal rules that jurors ought to follow when deciding a case. Jury instructions are given to the jury by the jury instructor, who usually reads them aloud to the jury. They are often the subject of discussion of the case, how they will decide who is guilty, and are given by the judge in order to make sure their interests are represented and nothing prejudicial is said.)

In its June 2015 opinion, the Supreme Court disagreed with the trial judge's decision to deny the instruction, and remanded the case to the lower courts. The Supreme Court did not have to address the question of the emoticon directly, but were clear that information related to the mental state of the accused threat-maker was relevant information for the jury.

• Emoticons popped yet again in the courts when a school administrator in Michigan filed suit after being fired. The suit cited multiple wrongdoings, one of the biggest of which was a defamation claim against a co-worker who had posted anonymously on a message board. The case has bounced back and forth between an arbitrator and the courts, but on the issue of defamation, an Appeals Court addressed the issue of the tongue-out emoticon as a signal of sarcasm. The court quoted an earlier case, *Gus Ghanam v John Does* (No. 312201, Macomb Circuit Court, LC No. 2012-001739-CZ):

'The joking, hostile, and sarcastic manner of the comments, the use of an emoticon showing someone sticking their tongue out [:-P] ... were made facetiously and with the intent to ridicule, criticise, and denigrate plaintiff rather than to assert knowledge of actual facts.'

Emoji and emoticons in South African criminal law and courts

Although the interpretation of the mean-

ing of emoji or emoticons used in an short message service (SMS), e-mail, or a social media post in order to determine the criminal state of mind or the criminal intention of a suspect is yet to confront South African criminal courts, it is clear that the international legal communities have long dealt with this issue.

South Africa, however, does not fall short of authority dealing with the admissibility of documents from an electronic source, whether e-mails, fax, SMS, or social media posts. Same is regulated by the Electronic Communications and Transactions Act 25 of 2002 (the ECTA).

The ECTA clearly provides the necessary peremptory requirements that need to be met before such data messages or electronic documents will be admitted as evidence before a court. Briefly, the identification of the instrument on which the electronic document was received, the originator, addressor, recipient/addressee, all need to be verified under oath. Compliance with the above requirements set out in the ECTA is thus essential for any data message to be admitted to court.

According to s 14 the data message meets the legal requirements of being presented or retained in its original form if –

- the integrity of the information from the time it was first generated in its final form as a data message has passed an assessment, on whether the information has remained complete and unaltered in the purpose for which information was generated, with having regard for all circumstances; and
- that the information is capable of being displayed or produced to the person to whom it is to be presented.

The above is read together with s 14(2) (a) to (c) of the ECTA.

As with any other evidence, and as seen in *S v Agliotti* 2011 (2) SACR 437 (GSJ), a subpoena is needed to access an individual's cell phone records. The regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002 (more popularly known as RICA) has been put in place to specifically make it easier to connect a cell phone account with a specific individual.

Conclusion

Whether it's a ☺, 😊, 😏, or a :-) it is clear that the courts can draw inference from these in determining the criminal state of mind or the intention of a suspect at the time a crime was committed.

Tshepo Confidence Mashile LLB (UL) is an attorney at Mkhonto and Ngwenya in Pretoria.



Afrikaans as hof taal: **Should it have a place?** *Ukuhlaziya*

By
Bouwer
van
Niekerk

**Afrikaans as court language:
Should it have a place? An analysis**



Picture source: Gallo Images/iStock

Ek is gek na Afrikaans. Dit is nie net die taal waarmee ek groot geword het, geleer lees het in en in geleer het hoe om te skryf nie, dis ook die taal waarin ek dink. Dis my taal. Dis ook die taal van taal townenars soos Ingrid Jonker en André P Brink, die taal van intellektuele soos NP van Wyk Louw en Willie Esterhuyse en die taal van pioniere soos Chris Barnard en Anton Rupert. Dis 'n taal wat ek praat sonder voorbehoud of verskoning, en ek koester die gesprekke wat ek met vriend en vyand daarin kan hê. Dit is die taal wat ek my driejarige seun leer praat, en waarin ek wil hê hy sy primêre en sekondêre onderrig in moet ontvang. Afrikaans is, in kort, 'n taal wat ek lief het, en ek sal altyd baklei vir die algemene behoud daarvan. Ek meen ook dat dit ook reg is dat alle mense só oor hulle taal moet voel; jou taal dra immers tot 'n groot mate by tot jou identiteit.

Dit gesê, kan ek nie help as om te wonder of dit in die jaar 2017 steeds 'n plek behoort te hê as 'n algemeen erkende regstaal in ons howe nie. Wat maak Afrikaans dan so spesiaal om saam met Engels die tale van ons regspleging te wees?

Hokaai, hoor ek klaar die taal bulle bulk. Vir wat nou hiér-die saak ter berde bring? Hoekom gaan staan en krap jy nou waar dit nie jeuk nie? My antwoord hierop is eenvoudig: Ek jeuk. En as ek – 'n gebore Afrikaanssprekende, wit man – jeuk, is ek seker dat baie van my mede landsburgers 'n bietjie meer as net jeuk. Want Afrikaans het (eufimisties gestel) 'n komplekse geskiedenis in hierdie land. En ek meen dit is maar slegs een van die hydraende faktore wat veroorsaak dat Afrikaans se plek in ons professie – een wat gereeld daarvan beskuldiging word dat dit nie vinnig genoeg transformeer nie – in oënskouw geneem moet word. Want, soos die doringboompie in Totius se boeiende gedig met dieselfde naam, meen ek dat alhoewel die wonde wat Afrikaans in ons geskiedenis gelos het tog gesond word as die jare kom en gaan, het dit tog 'n merk gelos, en daardie merk groei maar aldeur aan.

Iam crazy about Afrikaans. It is the language that I grew up in, the language in which I learnt how to read and write, and the language in which I think. It is my language. It is also the language of language wizards such as Ingrid Jonker and André P Brink, the language of intellectuals such as NP van Wyk Louw and Willie Esterhuyse, and the language of pioneers such as Chris Barnard and Anton Rupert. It is a language that I speak with pride and without apology, and I cherish the conversations that I can have in it with both friend and foe alike. It is the language that I teach my three-year-old, and the one in which I want him to have his primary and secondary education. In short, I love Afrikaans, and will always fight for its general preservation. I believe that it is correct for all people to feel this way about their mother tongue; your language plays a big part in your identity.

That being said, I cannot help but wonder whether, in 2017, Afrikaans should still have a place as a generally accepted court language. What makes Afrikaans so special that it, together with English, should be the languages of our legal system?

I can already hear the Afrikaans camp fighters: Slow down. Why bring up this topic? Why scratch where no itch exists? My answer thereto is simple: I am itching. And if I – a born Afrikaans speaking, white man – am itching, I suspect that many of my fellow countrymen and women are more than just itching. Afrikaans's place in the history of our country is (euphemistically put) complicated. And I believe that this history is but one of the factors that needs to be considered in considering Afrikaans's place in our profession – a profession that is often accused of not transforming at an acceptable pace. Because, like the thorn tree in Totius's poem entitled *Die Doringboompie*, Afrikaans has left an indelible mark on our history, and, even though the accompanying pain may be subsiding, the mark continues to grow.

There are many arguments to make why Afrikaans should no longer enjoy its status as a generally accepted court language, and we all know what most of these are.

First and foremost, the historical, emotive arguments come to mind. Afrikaans is the language of the oppressor. It is undeniably the language of the architects of Apartheid – a system that was designed to disenfranchise, humiliate and under-educate the majority of the people of this country, and one which legacy we continue to be confronted with. How can we possibly even attempt to argue that this particular language should continue to be generally recognised as one of only two of our 11 official languages that are allowed to be used in our courts in the same manner that English is allowed to be used?

Then there is the purely social argument. Even if we ignore the past and look at the current language regime cold, why is it that it is generally accepted that attorneys may draft pleadings in Afrikaans – only (at best) the third most commonly spoken language in the country – and not in Zulu, the most commonly spoken language in the country?

The counterargument hereto is predictable, and not entirely without merit. Afrikaans is an academic language, and our law reports – the primary source of authority for a judiciary that is to a very large extent bound by legal precedents – are filled with Afrikaans judgments, making it an indispensable part of our legal system.

The counterargument thereto is as predictable, and equally (if not more) meritorious. South Africa's substantive law is to a large extent founded in Roman Dutch law. But that does not mean that it is generally acceptable for attorneys to correspond with their colleagues or to argue matters in court in Latin or in Dutch.

Ngokubona kwami impikiswano enesigqi yileyo mpikiswano eyenzekayo ngqo. Ngaphandle uma uphiwe unobunyoningcu bezilimi, ngeke ukwazi ukufunda yonke lendatshana ngazo zontathu izilimi ebhalwe ngazo. Abafundi abaningi bebengeke bazihluphe ngokuqala nokuqala nje ukufunda lombhalo, bebezoyeka ukuwufunda esiqeshini sokuqala nje noma bebengeke bawuqonde ngokuphelele lombhalo uma bekungekho ukuhunyuswa kwawo. Nami uqobo lwami angikwazi ukubhala ngalezi zilimi zontathu – kumele ngithembele kummeli wami osaqeqeshwa ukuhumushela lo mbhalo olimini lwesizulu, kanti futhi angikwazi ukuhlulaza okubhaliwe. Ukungakwazi ukusibhala, ukusikhuluma nokusifunda isiZulu, akusiyo into engiziqhenya ngayo, angikwazanga nokuqiniseka ukuthi lokhu akubhalile kuyikona na; ngenxa yokuthi anginabo ubuchwepheshe bokuhlaziya lombhalo. Kodwa, futhi akusiyo into enginamahloni ngayo; akungikhathazi neze ukuthi angisazi isiZulu ikakhulukazi ngokohlangothi lomsebenzi njenommeli osesebenze isikhathi ngoba akukho lapho umsebenzi wobummeli uphoqa khona ukuthi ngikhulume, ngibhale noma ngifunde isiZulu. Impikiswano yami ilele kulombono wokuthi kungani iningi labammeli eNingizimu Afrika bephoqwa ukwazi ulimi olungakhulunywa iningi lwabantu, futhi ulimi abangeke baludinga emsebezini wabo?

Iam of the opinion that the strongest argument is the practical argument. Unless you are linguistically gifted, you will in all likelihood not be able to read this entire article in the three different languages that it is written in. Many readers would either not have bothered to start reading this article, would have stopped reading it at the beginning of this paragraph or would not have understood the whole article, had it not been for the translations. I myself am not able to write in three languages – I had to rely on my

capable candidate attorney to translate this paragraph into isiZulu, and I am likewise not able to proofread the accuracy of the translation. I am not proud of the fact that I cannot speak, read and write isiZulu, but I am also not particularly ashamed of this fact, nor am I worried about it, at least not from a professional point of view – as an admitted, practicing attorney, it is not required of me to be fluent in, or even understand, isiZulu. And this is the point: Why should so many (if not the majority) of practicing attorneys in South Africa be forced to understand a language – one that I am sure many do not understand, and have no inclination of learning – in order to ply their trade?

Let me be plain: I am the last person that wants to throw Afrikaans as a language into the dustbin of history. That being said, if one wants to be intellectually honest, it is difficult to argue that proffering one language (and this

is true for all languages, not just Afrikaans) above another, where that language is either not the most widely used language in a profession, or (worse) a language that is studied by only a select few on tertiary level and not at all understood by many, is not tantamount to some form of racism. And let me be plain once again: Racism is something that should be thrown into the dustbin of history.

Bouwer van Niekerk BA (Law) LLB (SU) Post Grad Dip Labour Law (UJ) Cert Business Rescue Practice (UNISA & LEAD) is an attorney at Smit Sewgoolam Inc. **Sinenhlanhla Mtshali BSocSci (Rhodes University) LLB (UNISA)**, who wrote the Zulu translations, is (at the time of writing) a candidate attorney at the same firm. □



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By
Clement
Marumoagae

Resolving divorce disputes through a collaborative process

The promulgation of the Jurisdiction of the Regional Courts Amendment Act 31 of 2008 had the effect of 'eradicating' Divorce Courts, which were subsumed into regional magistrate's courts, which were granted the power to adjudicate divorce matters (see Sloth-Nielsen 'The Jurisdiction of the Regional Courts Amendment Act, 2008: Some implications for child law and divorce jurisdiction' 36 (2011) *Journal for Juridical Science* 1 at 8). This was part of the government's initiative to transform the justice civil system by ensuring that justice in the form of access to courts is realised (s 34 of the Constitution). This initiative was mainly aimed at ensuring that the jurisdiction of magistrate's courts is widened in order for these courts to be forums of dispute resolution, which are easily accessible to the people. In order to minimise litigation within the magistrate's courts, government launched the Court-Annexed Mediation Rules, which are meant to encourage disputants to voluntarily submit themselves to media-

tion of disputes prior to commencement of litigation in the magistrate's courts (r 2 (1)(a)). In terms of these rules, 'mediation' is defined as 'the process by which a mediator assists the parties in actual or potential litigation to resolve the dispute between them by facilitating discussions between the parties, assisting them in identifying issues, clarifying priorities, exploring areas of compromise and generating options in an attempt to resolve the dispute' (www.justice.gov.za, accessed 21-2-2017).

Mediation has traditionally been viewed as a viable option to the litigation of family disputes generally and divorce matters in particular in South Africa (SA) (M De Jong M 'A pragmatic look at mediation as an alternative to divorce litigation' 2010 *TSAR* 515). The case of *MB v NB* 2010 (3) SA 220 (GSJ) highlighted the importance of mediation in divorce proceedings in SA. While courts, legal practitioners and academics in SA are advocating for reliance on mediation in divorce proceedings, established jurisdictions such as United States (US), Canada and

Australia have for decades considered the use of another alternative dispute resolution in divorce matters known as collaborative law. This article discusses the possibility of adoption of collaborative law in SA, and assesses whether this form of alternative dispute resolution is likely to be practiced successfully in SA.

Collaborative law

Duhaime's Law Dictionary defines 'collaborative law' as '[a] family law dispute resolution encouragement process set in writing which includes a promise to negotiate in good faith, to engage in the exchange of private and confidential information on a without prejudice basis, and a motivational commitment that the participating lawyers or law firms would withdraw if the negotiations fail' (www.duhaime.org, accessed 21-2-2017).

In the US, the Uniform Collaborative Law Rules and Uniform Collaborative Law Act (<http://leg.mt.gov>, accessed 21-2-2017) were adopted in 2009 in order to ensure that there is uniformity in the manner in which collaborative law

is practiced in that country. Rule 2 of these rules endorses the disqualification agreement which is an integral part of collaborative law, which distinguishes it from other forms of alternative dispute resolution methods, including, mediation (Pauline H Tesler *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation* (American Bar Association 2008) at 5). In terms of this agreement, parties sign an agreement that while they are each represented by their respective legal representatives, such legal representatives' mandate is limited to only assisting them to negotiate in good faith for them to reach an agreement. In that, should they fail to reach an agreement and wish to take the matter to court, then their respective legal representatives will be disqualified from representing them in court (Nancy Cameron 'Collaborative Practice in the Canadian Landscape' 49 (2011) 2 *Family Court Review* 221 at 226). The collaborative law agreement to participate in the collaborative process is often referred to as the four-way agreement, which covers both parties and their legal representatives. In terms of this agreement, parties agree to, among others, the –

- disqualification stipulation;
- duty to full and open disclosure;
- duty of good faith, honesty, integrity and respect;
- description of confidentiality rule;
- terms relating to the use of experts for mutual benefit; and
- right to withdraw from the collaborative process when the need arises (Shiela M Gutterman *Collaborative Law: A New Model for Dispute Resolution* (Bradford Publishing Company 2004) at 52).

According to Tesler (*op cit* at XX): 'When the sole agenda is settlement, and when the sole measure of lawyer success is achieving an agreement both clients can accept, and when the lawyers have been instructed by their clients not to include court-based resolution as part of the range of possible solutions for a given problem, a quantum leap in problem solving frequently occurs: Both lawyers and clients marshal their creative intellects toward finding solutions for each problem that will work well for both parties'. In other words, legal practitioners focus not only on what is best for their clients alone, but consider the interests of the other parties and thus advise their clients to be considerate in their demands. This is particularly important in divorce matters, because at times such matters go on for years – not because they cannot be settled – but because of external issues such as parties' anger, desire to punish each other and general unreasonableness in an attempt to make the other's life miserable. As such, collaborative law enables the legal representatives to create an environment for parties to see the bigger picture and

in the process attempt to minimise the costs relating to their dispute by being reasonable in their demands. This is particularly so when parties have children, because they will continue to play a role in each other's lives. Thus, this process aims to preserve the relationship of the parties.

The Law Society of Australia has observed that in relation to family law, collaborative practice works to –

- reduce costs by turn off open-ended litigation expenses;
- empower the clients by allowing them to keep control of the proceedings and participate fully in crafting the result they desire;
- maintain and preserve relationships beyond divorce;
- have parties negotiate respectfully and promote the interests of the children as a matter of priority; and
- fully explore and develop 'win-win' and creative solutions for both parties ('Collaborative Practice in South Australia', www.lawsocietysa.asn.au, accessed 21-2-2017).

Collaborative law has been criticised that it raises ethical concerns. It has been argued that the disqualification agreement, might lead to vulnerable clients being coerced into unfavourable settlements by the threat of being 'abandoned' by their legal representatives if they do not agree to settle in accordance with such legal representatives' guidance (Julian E Thomas 'The ethical implications of collaborative law' (2013) paper 2 at 5, www.civiljustice.info, accessed 21-2-2017). While this criticism is welcomed, nonetheless, it would not necessarily be easy for legal representatives to pressure their clients during the collaborative process because clients are given wide autonomy to determine the resolution of their disputes. Clients are part of the negotiations and are allowed to raise their concerns freely, and can decide for themselves whether the proposed solution meets their needs and interests or not. It has also been argued that an agreement requiring legal representatives to withdraw is unreasonable in the sense that, when the parties have to find new legal representatives that may lead to extremely asymmetrical costs on the two parties – one party can do it cheaply, the other only at great expenses (Scott R Peppet 'Lawyers' bargaining ethics, contract, and collaboration: The end of the legal profession and the beginning of professional pluralism' 90 (2005) *Iowa Law Review* 475). I am of the view that this can actually be seen as an incentive for parties to attempt to a reach mutually beneficial solution, because they both would incur costs when the process collapses. In an attempt to discourage litigation in divorce matters and further fracture parties' relationships, it is important that divorce law-

yers craft innovative ways which will assist their clients to divorce amicably. Such a culture can be addressed through a collaborative process which can lead to settlements being reached sooner rather than later at great expenses. I have argued elsewhere that:

'Collaborative law enables legal representatives not to think about themselves by pushing for an outcome which will lead to their clients emerging as victorious and them being viewed as better legal representatives. This winning mentality is part of the South African divorce litigation system which becomes more evident when legal representatives attempt to reach a settlement in what is referred to as round table conferences in South Africa' (Clement Marumoagae 'Does collaborative divorce have a place in South African divorce law?' 49 (2016) 1 *De Jure* 41 at 54).

I am convinced that collaborative law as an alternative – not only to litigation but to also other available dispute resolution mechanisms creates – a suitable environment for the resolution of matrimonial disputes generally. Indeed, when two lawyers are committed to social justice and the wellbeing of their clients, they would provide legal advice that is more building rather than one that is destructive to the parties' relationships. This can be achieved by working together to create an environment, which enables divorcing spouses to see the bigger picture by accommodating each other's needs. Currently, it is possible for divorces to run for years only to end by parties eventually signing a settlement agreement.

Conclusion

While mediation has been seen as a preferred alternative dispute resolution method, it is hoped that divorce lawyers would consider adopting collaborative law when dealing with their divorce cases. Currently, in divorce matters legal representatives convene round table conferences in order to negotiate, but most importantly drive their respective client's positions. Round table conferences can be ideal platforms to develop collaborative practice in SA. This will require practitioners to change their attitudes and not be litigation orientated. Once divorce instructions are received, it might be ideal to inquire from the client his or her views on the resolution of the divorce on a collaborative way wherein the needs and interests of both parties will be duly considered in order to reach an amicable solution.

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By
Craig
Berg

Real estate mediation – *stop the costs before they get to court*

Mediation is an alternative basis for resolving disputes, and in this article, I will focus on the value and advantages of mediation in commercial and residential real estate disputes.

In a South African context, one has to consider the nature of the real estate.

Commercial real estate disputes create limited legislative hurdles for parties, such as the Consumer Protection Act 68 of 2008 (CPA) (if applicable), whereas the residential arena contains more onerous legislation, such as the Rental Housing Act 50 of 1999 (as amended) (RHA), the

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) and the CPA, which are referred to in more detail below.

Compliance with the aforesaid Acts are normally adjudicated pursuant to litigation, which is costly and may affect the value of rental space and the respective parties' interests at conclusion thereof.

The nature of the real estate

The nature of the real estate determines what disputes may arise.

Disputes generally encountered in residential real estate transactions include:

- Incoming and outgoing inspections in terms of the RHA.
- Non-payment of rental and ancillary charges.
- Rights of cancellation.
- Refunding of a deposit.
- Reinstatement costs.
- Differing interpretations of lease provisions by the landlord or the tenant.

More often, however, disputes emerge when dealing with the eviction of a tenant. A balancing act occurs between a tenant's rights to adequate housing under the Constitution (s 25) versus the rights of the landlord to its property (s 26).

TOP COSTS

- rent calculations or review;
- escalation calculation or review;
- rebuilding and relocation;
- sub-letting;
- improvements, changes or alterations to the premises;
- tacit relocation;
- responsibility for repairs/reinstatement;
- right of retention and enrichment *liens*;
- damages;
- legislation; and
- exclusivity.

Tenant installation, beneficial occupation and delivery of commercial space also create numerous disputes.

A court, in the granting of eviction orders, may use its discretion to delay the execution thereof (see *Paardevelei Properties (Pty) Ltd v TNV Plastics (Pty) Ltd and Another* (WCC) (unreported case no 2450/2016, 21-6-2016) (Bozalek J)).

Benefits of mediation

Mediation, as an alternative to litigation, advances parties' respective interests instead of adjudicating on them and requires willingness to compromise by the parties.

Mediation can produce results in the most unpropitious of circumstances (*MB v NB* 2010 (3) SA 220 (GSJ)), especially when conducted by people who have been properly trained in the process.

Mediation is likely to ensure a just and equitable outcome based on consensus between the parties.

Most recently, in the matter of *City of Cape Town v Those Persons Occupying and/or intending or attempting to occupy or erect structures on erf 18370, Khayelitsha* (WCC) (unreported case no 13700/14, 14-12-2015) (Nuku AJ), Nuku AJ suspended an eviction order brought by the City of Cape Town, one of the reasons being 'where a municipality applies for an eviction it is bound to act reasonably. Part of acting reasonably is the engagement with those who are to be evicted as that ensures that they are treated with dignity in the process'.

Mediation encourages reasonable engagement between the parties in a less adversarial way and should this path of least resistance be unsuccessful, the parties are free to approach the courts, perhaps on more favourable terms curtailing costs, time and stress.

From a commercial point of view, an early and satisfactory business solution ensures that the parties save face, satisfy shareholder concerns and automatically mitigates damages as both parties have certainty.

Mediation achieves among other things the following:

- Less time and costs compared to litigation as mediation is often completed in a day at a fraction of the cost of litigation or arbitration.

- The cost of mediation is agreed on and legal representation is not required.

Commercial property transactions often involve complex leases with detailed restrictions and requirements, which may include various exclusivity and other technical provisions.

While judicial officers are capable jurists who familiarise themselves with a case quickly, there are significant advantages to having disputes resolved by a mediator with the knowledge and expertise of commercial real estate transactions who may create solutions generally not possible or available in the litigation process.

- The parties control the process.

The parties are instrumental in creating resolutions and generally abide by it.

The proceedings are confidential and, therefore, keep reputations intact.

Mediation usually reflects a level of trust and recognises that the adversary is a responsible party who will act fairly and in good faith during the mediation.

Parties are more inclined to speak more freely during a confidential mediation than at trial.

Mediation offers a party an opportunity to understand the strengths and weaknesses of their case and forces the party to consider the analysis and perspective of an objective third-party and to be more realistic in his or her approach to resolution.

The parties resolve the outcome instead of a judicial officer and the satisfaction with the outcome is greatly increased.

Many commercial real estate experts cite the preservation of business relationships as a major advantage to resolving disputes through mediation rather than litigation and often save the opportunity for the parties to collaborate in future.

Mediation clauses

The confidence in mediation has grown in South Africa (SA) as can be seen from the introduction of court-annexed mediation in 2014, by the Minister of Justice under the auspices of the rules regulating the conduct of proceedings of the magistrate's courts of SA, in ch 2 of the rules, and in conjunction with the Magistrates' Courts Act 32 of 1944 (as amended).

Mediation will force parties to come to the table and should aid in identifying the issues that are hiding under the surface, the so-called 'Iceberg Theory', whereas litigation can create smoke and mirrors caused by elegant and articulate writing and arguing. Mediation leaves less room to manoeuvre.

On the next page is an example of a mediation clause, which readers may want to use or adapt to suit their client's needs:

This balancing act is normally done by the courts under the auspices of judicial oversight and is based on its discretion (s 4(6) of PIE) in reaching a just and equitable outcome for the parties after considering the factual matrix of each matter.

The court has to balance the rights of the parties to ensure that justice and equity prevail (see *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC)).

Parties, or at least one of them, are often not satisfied with the outcome.

Disputes encountered in commercial real estate transactions include –

Mediation

1. The parties agree to attempt to resolve any dispute, claim or interpretation arising out of or relating to this agreement by mediation, which shall be conducted under the then current mediation procedures of the Accredited Court-Annexed Mediators Association (AFSA), or any other procedure upon which the parties may agree. The parties further agree that their respective good faith participation in mediation is a condition precedent to pursuing any other available legal or equitable remedy, including – litigation; arbitration; or other dispute resolution procedures.

2. Either party may commence the mediation process by providing the other party written notice, setting forth the subject of the dispute, claim or controversy and the relief requested. Within ten days after the receipt of the foregoing notice, the other party shall deliver a written response to the initiating party's notice. The initial mediation session shall be held within ten days after the initial notice. The parties agree to share equally the costs and expenses of the mediation (which shall not include the expenses incurred by each party for its own legal representation in connection with the mediation).

3. The parties further acknowledge and agree that mediation proceedings are without prejudice and largely settlement negotiations, and that, to the extent allowed by applicable law, all offers, promises, conduct and statements, whether oral or written, made in the course of the mediation by any of the parties or their agents shall be confidential and inadmissible in any arbitration or other legal proceeding involving the parties; provided, however, that evidence which is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the mediation.

4. The provisions of this section may be enforced by any court of competent jurisdiction, and the party seeking enforcement shall be entitled to an award of all costs, fees and expenses, including reasonable attorneys' fees, to be paid by the party against whom enforcement is ordered.

Recent case law
In consideration of recent case law, I have reached the conclusion that once an agreement imposes an obligation on parties to negotiate, then it should follow that any negotiation must be done in good faith.

Recent constitutional jurisprudence has raised the concept of negotiation in good faith and the development of the common law of contract to bring it in line with constitutional principles such as *Ubuntu* (meaning: 'A quality that includes the essential human virtues; compassion and humanity' (<https://en.oxforddictionaries.com>, accessed 22-2-2017)). This should follow suit in mediation, which is a form of inquisitive negotiation.

Cases such as *Makate v Vodacom Ltd* 2016 (4) SA 12 (CC) and *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) refer to the duty on parties to negotiate in good faith when they are contractually bound to do so.

The CC in *Nkata v FirstRand Bank Ltd* 2016 (4) SA 257 (CC) emphasised that the National Credit Act 34 of 2005 was a clean-break from the past and encourages dialogue between consumers and credit providers, leaving room for mediation in agreements of this nature as well.

Conclusion

Mediation aims to benefit borrowers, lenders, purchasers, sellers, consumers etcetera, in respect of loan, purchase, sale, or lease agreements and has the potential to remove a dispute from the high-cost litigation system to a more efficient, cost-effective mediation.

Even if the parties do not resolve the dispute by mediation, the mere conducting of the mediation process will place the parties in a position to identify the real issues in dispute and the parties can always agree to approach a court or arbitrator on a 'stated case basis', which will limit costs, time and unnecessary delays such as postponements, non-allocation of magistrates or judges or the dreaded 'sick note'.

'A renewed emphasis on creative, privately developed approaches where people take ownership for resolving disputes may provide courts more time and resources to focus on those matters that genuinely require public trial' (Jerry Slusky 'Mediating the commercial Lease Dispute' (www.mediate.com, accessed 22-2-2017)).

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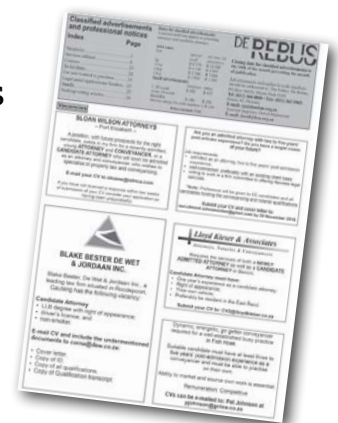
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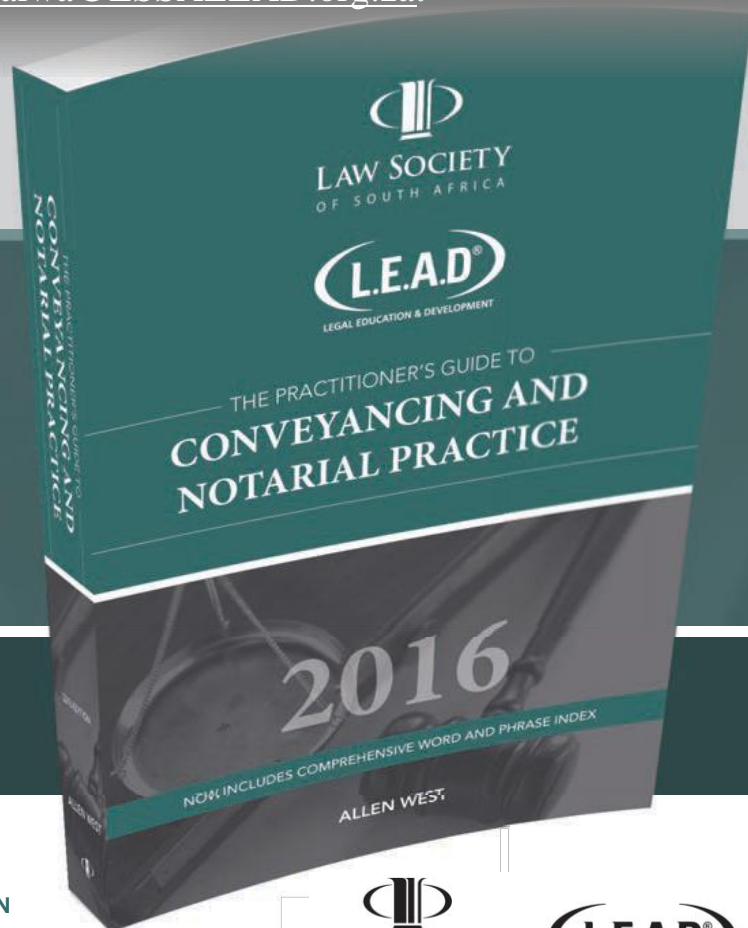
Allen is a lecturer at the University of Pretoria and a moderator and consultant of Conveyancing subjects at UNISA. He has presented courses for the LSSA (LEAD) since 1984 and has served on the following boards: Sectional Title Regulation Board, Deeds Registries Regulation Board, and Conference of Registrars, as well as numerous other related committees. Until September 2014, Allen was the editor of the South African Deeds Journal (SADJ) since its inception.

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The doctrine of precedent and the value of s 39(2) of the Constitution

By
Bayethe
Maswazi

The principle of *stare decisis* is a juridical command to the courts to respect decisions already made in a given area of the law. The practical application of the principle of *stare decisis* is that courts are bound by their previous judicial decisions, as well as decisions of the courts superior to them. In other words a court must follow the decisions of the courts superior to it even if such decisions are clearly wrong. The importance of this principle is best illustrated by the words of Brand AJ, as he then was, in the case of *Camps Bay Ratepayers' and Resident Association and Another v Harrison and Another* 2011 (4) SA 42 (CC), when he said: 'Stare decisis is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution.' Clearly the above dictum does give the doctrine of precedent a constitutional flavour, but whether the doctrine ought always to be subject to the Constitution or *vice versa*, Brand AJ did not deal with that, opining as he did that the issue was not relevant in the instant matter since he was dealing with post constitutional precedent. That observation illustrates the complexity of the issue, at least when a pre-constitutional precedent is relevant and binding. The issue though does not only pertain to pre-constitutional precedents, even post constitutional precedent may sometimes present problems.

In this article I examine whether a court in a given scenario is bound by the principle of *stare decisis* in circumstances where it deals with the decision or precedent set by a court superior to it, particularly, if the latter has interpreted a particular legislative provision in a manner which plainly does not accord with the command or



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the constitutional directive contained in s 39(2) of the Constitution. I further examine the relationship between s 39(2) of the Constitution and the doctrine of precedent with a view to determine the extent to which courts have solved the possible conflict between the two. The question then is, in the event of the conflict between the doctrine and s 39(2) of the Constitution, which of the two principles must reign? The obvious answer is that s 39(2) by virtue of the supremacy of our Constitution must reign. An excavation of various court decisions suggests that the issue is not that simple and courts have not given a clear answer or where direction has been given by the Constitutional Court (CC), lower courts have not readily followed. Is there a real conflict between the two principles? If so, can a reconciliation between them be achieved? Confronted by a binding precedent on the one hand and s 39(2) on the other in a given legal issue, where does a court go? These questions are not intended to suggest that there is an automatic conflict that arises at every given interface between the doctrine and s 39(1) of the Constitution. On the other hand, they arise because there has been a trend where the significance of s 39(2) have somehow been diminished. The survey of these cases in this article will reveal this tendency.

The meaning of s 39(2) of the Constitution

Section 39(2) directs every court or tribunal – when interpreting legislation or developing common law or customary law – to promote the object, purport and spirit of the Bill of Rights. The development of common law and customary law are beyond the scope of this article, which is concerned only with the interpretation of legislation, though s 39(2) affects the common law and customary law as well as the section suggests. There are various pertinent factors that arise out of the reading of s 39(2). Firstly, the section confronts directly and singularly

every court as it interprets legislation. Secondly, it imposes a duty on courts to view every legislation through the lens of the spirit, object and purport of the Bill of Rights, by making sure that its spirit, purport and object percolate through the interpretive process. In other words, the final product of each interpretive process must exhibit proof of the promotion of the purport, spirit and object of the Bill of Rights. Section 39(2) does not necessarily imply the elevation of a particular right in the Bill of Rights, nor a transfiguration of same into spirit, purport and object of the Bill of Rights. The meaning then, I submit, of the purport, spirit and object of the Bill of Rights is not the raw collections of the rights in the Bill, it is the profound and collective message found in the values of the Constitution as encapsulated in s 1 of the Constitution. What s 39(2), therefore, asks for is that, these values must shine through in the interpretive process. I do not propose this as the best meaning of s 39(2), rather I suggest it as the most preferable approach towards the interpretation of s 39(2). No occasion has arisen, so far, for the CC to consider itself confronted by the issue as to what is the true or best meaning of s 39(2), at least not to my knowledge, nor has the CC ever been asked how courts ought to approach the interface between s 39(2) and the doctrine of precedent, an issue which makes this article all the more significant.

In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC), Langa DP had an occasion to consider the meaning of s 39(2) and he opined as follows: 'The purport and objects of the Constitution finds expression in s 1, which lays out the fundamental values which the Constitution is designed to achieve.'

The *Hyundai* case is not, in my view, the best example to illustrate the importance of s 39(2) because the case implicated directly various rights in the Bill of Rights, yet the provisions of s 39(2) do not demand judicial attention only when there is a constitutional issue to be considered, they seek attention of the court whenever it interprets legislation. Nonetheless, the *Hyundai* matter was an important foundation in this regard.

The pertinent precedent on s 39(2) and *stare decisis*

In *S v Walters and Another* 2001 (10) BCLR 1088 (TK) Jafta J was confronted with a question of whether s 49 of the Criminal Procedure Act 51 of 1977 (CPA) in sanctioning a peace officer to kill a fleeing suspect who is suspected of committing a schedule 1 offence, was

constitutional. Having examined the applicable precedent including the decision of the Supreme Court of Appeal (SCA) in *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA), he came to the conclusion that the section was unconstitutional. Of interest in the case is that even though the court in the *Walters* matter had a wide opportunity to consider whether to avoid the applicable judicial precedent, which was binding on it through s 39(2) of the Constitution, the court chose not to refer to the section at all. In the result Jafta J lost an opportunity to define the relationship between s 39(2) and the doctrine of precedent, even though he grappled with the question whether he was bound by the SCA decision in the *Govender* matter.

In *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 (SCA), Harms DP in a unanimous decision, took the opportunity to consider whether a peace officer – when considering the arrest of a suspect under s 40 of the CPA – must also additionally consider whether there are other less restrictive means of securing the attendance of the suspect at court. This was in the context of the decisions of the various High Courts, which had held that arrest must be a last resort, in other words, a peace officer must consider alternative to arrest before actually effecting the arrest. Harms DP issued a stern rebuke of the High Courts and held that this was not necessary since the jurisdictional requisites of an arrest are contained in s 40 of the CPA, no more is needed by the peace officer other than the factors set out in s 40. Of s 39(2) he merely held that it was not suggested in what way s 40 of the CPA may be interpreted to promote the purport, spirit and objects of the Bill of Rights. In other words he was not convinced that as he was interpreting s 40 of the CPA, he had to consider s 39(2) of the Constitution in interpreting s 40 of the CPA.

In *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC), the CC had to consider the provisions of the Prescription Act 68 of 1969. Jafta J recognised the significance of s 39(2) when dealing with pre-constitutional precedent. However, this recognition was somehow dampened by the observation Jafta J made when he said at para 90: 'The Constitution in plain terms mandates courts to invoke the section [s 39(2)] when discharging their judicial function of interpreting legislation. The duty is triggered as soon as the provision under interpretation affects the rights in the Bill of Rights.'

Section 39(2) on its plain wording seems applicable every time a court interprets legislation not only when that legislation affects the Bill of Rights. Therefore, with respect, the last sentence of the above passage is not necessarily the correct interpretation of s 39(2). The interpretation attached to

the section by Jafta J in the above dictum illustrates the complexity surrounding this section. But, the *Makate* case was not dealing with the interface between s 39(2) and doctrine of precedent, accordingly, while it is important for the definition of the section, it bears less relevance to the theme of this discussion.

In *Turnbull-Jackson v Hibiscus Coast Municipality and Others* 2014 (6) 592 (CC) the CC was confronted with the argument that the decision of the CC in *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) was more in accordance with the provisions of s 39(2) than the SCA decision in *True Motives 84 (Pty) Ltd v Mahdi and Another* 2009 (4) 153 (SCA) concerning the meaning of s 7(1)(b) of the National Building Regulations and Building Standards Act 103 of 1977. The pity though is that s 39(2) did not play as significant a role as expected in the overall decision in the *Turnbull-Jackson* case.

Overall these cases illustrate the complex role that s 39(2) of the Constitution has played so far in our jurisprudence, particularly with the inconsistent recognition that the section has been accorded by our courts. The fact that no case has considered pertinently, which direction our jurisprudence must take in the relationship between s 39(2) and the doctrine of precedent, is an illustration of the fact that this section has not been given as much recognition in our jurisprudence as one would expect.

Conclusion

Section 39(2) has had a difficult journey within the South African jurisprudence, from its inception its interface with judicial precedent has made the journey all the more complex. The voice of the CC as the guide to the SCA and the various High Courts is needed. Regardless of this situation, it is unlikely that the section will be subordinated to judicial precedent given the supremacy of the Constitution. It is the doctrine that should be subordinated to the Constitution and not the Constitution to the doctrine. The common law must develop in consonance to the Constitution. Section 39(2) is equally an important mechanism of building a solid human rights jurisprudence demanded by s 1 of the Constitution, the sooner our courts realise this, the better. There is a need to give meaning to the relationship between s 39(2) and the judicial precedent, our courts must be urged to define this relationship, it is important for the survival of the nascent human rights culture that we have built since 1994.

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THE LAW REPORTS

February 2017 (1) South African Law Reports (pp 333 – 653);
[2016] 3 All South African Law Reports August (pp 345 – 667);
[2016] 4 All South African Law Reports November (pp 299 – 664);
[2016] 4 All South African Law Reports December (pp 665 – 980);
January [2017] 1 All South African Law Reports (pp 1 – 312); 2017 (2)
Butterworths Constitutional Law Reports – February (pp 131 – 266)

This column discusses judgments as and when they are published in the South African Law Reports, the All South African Law Reports and the South African Criminal Law Reports. Readers should note that some reported judgments may have been overruled or overturned on appeal or have an appeal pending against them: Readers should not rely on a judgment discussed here without checking on that possibility – *Editor*.

Abbreviations

CC: Constitutional Court
ECG: Eastern Cape Division, Grahamstown
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
KZP: KwaZulu-Natal Division, Pietermaritzburg
LAC: Labour Appeal Court
LC: Labour Court
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Attorneys

Applicant must be a fit and proper person to be admitted and enrolled as an attorney: The facts in the case of *Ex parte Mdyogolo* 2017 (1) SA 432 (ECG) were that in 2015 the applicant, Mdyogolo, applied to court for admission and enrolment as an attorney. However, he had a criminal record in that in 1991 he was convicted of theft and sentenced to two months imprisonment after stealing a cassette tape from a shop. In 2010 he was convicted of drunken driving and sentenced to a fine. More difficult though was a conviction for armed robbery with aggravating circumstances, which he committed in June 1994. On that occasion the applicant, together with another person, being armed with a semi-automatic rifle, robbed a petrol filling station. In his admission application he stated that the robbery was committed for political

reasons as part of the armed struggle conducted by Azanian People's Liberation Army, a military wing of the Pan Africanist Congress (PAC), a political party. However, that was not true as by then the armed struggle was over, the PAC had taken part in general elections held in April 1994 and was represented in Parliament. For the robbery he was sentenced to prison for ten years, during which time he applied to the Truth and Reconciliation Commission (TRC) for amnesty. In the TRC application he also provided false information. The TRC application was discontinued as he was granted parole concerning the robbery sentence. Given his background the question before the court in the admission application was whether he was a fit and proper person to be admitted and enrolled as an attorney.

Plasket J (Beshe J concurring) held that he was not and dismissed the application. The attorney's profession was an honourable one, which demanded complete honesty and integrity from its members. When a court was called on to determine whether a person was fit and proper to become or remain an attorney, it was required to weigh up the conduct that was alleged to disqualify the person against the conduct expected of an attorney. The mere fact that a person had committed an offence was not a bar to his or her appointment or a trigger for his or her name to be struck from the roll.

The applicant's participation in a robbery in which he was armed with a semi-automatic rifle was indicative of a grave character flaw. The version of events that he placed before the TRC, which was given under oath, was clearly mendacious, and transparently so. That too was indicative of a person who was not fit and proper to be admitted as an attorney. In the present application he lied about the robbery. That, apart from being dishonest and completely at odds with the ethical probity expected of an attorney, amounted to a cynical attempt to mislead the provincial law society and the court. That was evidence of lack of honesty, integrity and trustworthiness, all of which were essential qualities for any member of the attorney's profession.

Banking

Duty of bank in respect of customer's deposits where an account has been attached by notarial bondholder: In *Spar Group Limited v FirstRand Bank Ltd and Another* 2017 (1) SA 449 (GP); [2016] 4 All SA 646 (GP) the plaintiff, Spar Group, a wholesaler, had an agreement with Umtshingo (U), a retailer which was represented by one, Paulo, in terms of which the plaintiff supplied goods and services to U on credit. U operated three businesses in Nelspruit, Mpumalanga, each of which had a separate banking account with the first defendant FirstRand Bank. To secure

U's indebtedness, the plaintiff and U entered into a notarial bond covering U's movables. When U defaulted on repayments the plaintiff obtained a court order perfecting the notarial bond and took over control, as well as possession of the businesses, which continued operating, as Paulo contended that closing them down would be financially harmful. The money generated by the continued operation of the businesses was paid into the old accounts, Paulo refusing to substitute the plaintiff as the new beneficiary. As U was indebted to the first defendant in respect of overdraft facilities provided, the latter used speed-point payments and cash deposits credited into one of the businesses' account to set-off the debt owed to it. The funds going into the other two accounts of the businesses were withdrawn by Paulo. That had the result that although the plaintiff had perfected the notarial bond and was running the businesses, it did not receive the expected financial benefits. Accordingly, it instituted proceedings against the first defendant to recover the funds that had been used to set off its debt, and against Paulo for withdrawals made. It was the plaintiff's case that in using the funds to set off its claim, the first defendant had unlawfully appropriated funds, which belonged to it while in the case of funds withdrawn by Paulo it was alleged that the first defendant had breached a duty of care,

which it owed to it to warehouse. In other words, the plaintiff's contention was that there was a duty on the first defendant to prevent Paulo from withdrawing the funds as a result of perfection of the notarial bond. The plaintiff having obtained default judgment against Paulo, proceedings continued against the first defendant only. The claims were dismissed with costs.

Fourie J held that mere knowledge of the bank about a particular arrangement between the accountholder and a third party (perfection of the notarial bond in this case) was not sufficient. A person, such as the plaintiff in the instant case, claiming to have a quasi-vindictory claim with regard to funds deposited into an account held in the name of a client of the bank would have to prove that the bank was a party to an agreement with its client to warehouse such moneys on behalf of such other person claiming to be entitled thereto. That was a sound principle because in the absence of such an agreement (between the bank and its client, the accountholder) it would mean, for instance, that the accountholder and a third party would be able to agree, if the client's account showed a debit balance, that funds deposited into that account by the third party would not fall into the ownership of the bank by merely notifying the bank about that arrangement. The effect would be that a bank could then unilaterally be deprived of its ownership with regard to moneys deposited into such account without being a party to the agreement. In this case there was no such warehousing agreement between the plaintiff and the first defendant.

It would be unreasonable

to conclude that the first defendant had a legal duty (the duty of care) to avoid economic loss to the plaintiff by preventing U or Paulo from withdrawing money from the accounts concerned in the absence of a warehousing agreement with it.

Powers and duties of a Repayment Administrator under the Banks Act: The facts in *Kruger v Joint Trustees of the Insolvent Estate of Paulos Bhokinkosi Zulu and Another* [2017] 1 All SA 1 (SCA) were that in March 2011 the Registrar of Banks, acting in terms of the South African Reserve Bank Act 90 of 1989 (the Act), appointed the appellant, Kruger, as temporary inspector to investigate the activities of one Zulu and the entity which he controlled, known as Travel Ventures Institution (TVI). The inspection indicated that Zulu, through TVI, was conducting the business of banking by obtaining money from members of the public contrary to the provisions of the Banks Act 94 of 1990 (the Banks Act), as both were not registered as a bank or authorised to conduct the business of a bank in terms of the Banks Act. Moreover, Zulu was operating a pyramid scheme, the like of which had been declared unlawful in a number of countries around the world. As a result the registrar appointed the appellant as a repayment administrator to manage and control repayment of all moneys obtained by Zulu through his entity. Although it was not necessary to seek a court order to that effect as the Banks Act gave him authority to do so, the appellant nevertheless approached the court by way of urgent *ex parte* application for an order authorising him to recover and take control of all of Zulu's assets, including,

immovable properties. The KZP, per Radebe J, granted the rule *nisi* which it discharged on the return day on the grounds that the application was not urgent, Zulu had not been served with the application (as it was *ex parte*) and further that interested parties had not been joined. That led to the present appeal to the SCA. However, by the time of the hearing of the appeal the matter had become moot as the estate of Zulu had been sequestrated and his trustees substituted as the respondents. The appeal was upheld, with costs to be costs in sequestration of Zulu's insolvent estate.

Dambuza JA (Mpati AP, Willis, Salduker JJA and Poterill AJA concurring) held that even though Zulu's assets could no longer be placed in appellant's possession, it was still necessary to consider the appeal to clarify the powers and obligations of a repayment administrator under the Banks Act and to set out the correct approach when considering similar matters.

The duty of the repayment administrator was to recover and take possession of the assets of a person who was the subject of a directive. To require the repayment administrator to approach a court on notice to the person subject to the directive and adherence to normal filing times would defeat the purpose of the repayment process. By operation of law, the assets of a person who was the subject of the registrar's directive vested in the repayment administrator immediately on his or her appointment.

There was no basis for distinguishing between assets acquired through the operation of the unlawful banking business and those acquired innocently. In fact, s 84(4) of the Banks Act did not ex-

clude honestly acquired assets from consideration for realisation for purposes of raising repayment funds. The section merely set out as one of the duties of repayment administrator, the taking of reasonable steps to expedite repayment of money.

The High Court erred in discharging the rule *nisi*. The appellant was entitled, even without the court order, to take the steps in respect of which he sought the court's pronouncement. However, in the light of Zulu's sequestration and the consequent appointment of trustees to assume control of his estate it was not open to the court to grant an order the effect of which would be to authorise the appellant to also take the assets in Zulu's estate. The role of a repayment administrator was different from that of a trustee and was limited to repayment of money unlawfully obtained in the conduct of an unregistered banking business. In this case, once the order of sequestration was granted, the powers of the trustees, on appointment, took precedence over those of the repayment officer.

Constitutional law

Unconstitutionality of Parliament's rules and policy on limiting broadcasting of unparliamentary conduct and grave disorder: Paragraph 8.3.3.2 of Parliament's Policy on Filming and Broadcasting (the policy) – which was adopted in September 2003, but was applied for the first time in November 2014, due to disruptive behaviour in Parliament of the Economic Freedom Fighters, a political party – provides that televising of parliamentary proceedings may continue during incidents of grave disorder or unparliamentary behaviour.



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However, during that time a television camera is required to focus on the Chair, meaning the Speaker of the National Assembly or the Chairperson in the case of National Council of Provinces. The policy defines 'unparliamentary behaviour' as any conduct which amounts to defiance of the person presiding over the proceedings, being the Speaker or Chairperson, as the case may be. Rule 2 of the Rules of Parliament (rules) defines 'grave disorder' as incidents of an individual, but more likely collective misconduct, of such a seriously disruptive nature as to place in jeopardy the continuation of the sitting. Both the policy and rules may conveniently be referred to as 'disruption provisions'. Their essence is that in the event of disruptive behaviour in Parliament, television cameras should focus on the person presiding over the proceedings and not the troublemaker.

The constitutionality of the above disruption provisions was challenged in *Primedia (Pty) Ltd and Others v Speaker of the National Assembly and Others* 2017 (1) SA 572 (SCA); [2016] 4 All SA 793 (SCA), where the SCA dealt with an appeal against the decision of the WCC per Dlodlo J, with whom Henney J concurred, while Savage J dissented. The High Court having dismissed an urgent application for an order declaring the provisions unconstitutional, the SCA upheld the appeal with costs. The SCA also declared unconstitutional the incident of jamming of signal of cellular telephones and other electronic equipment which preceded the State of the Nation Address (Sona) by the President of the country in February 2015. The appellants, Primedia and others, contended that the disruption provisions and jamming of electronic devices violated the public's right to see and hear what was said and done in Parliament during Sona of 2015.

Lewis JA (Cachalia, Tshiqi, Swain and Zondi JJA concurring) held that usage of a jamming device was unlawful as it had been activated

without the approval of the Speaker as required. On the other issues in the case it was held that the behaviour of Members of Parliament (MP) in Parliament was something which the public had the right to see and hear. It was political speech of the first order. Freedom of speech in Parliament was fundamental to an open and democratic state. The right to vote held by all adult citizens in the country could be exercised meaningfully only if voters knew what their representatives did and said in Parliament. Since the vast majority of people were not actually in Parliament, they relied on public reports and broadcasts.

Any measure adopted by Parliament had to be objectively reasonable. If it was not, it would be subject to review and constitutional challenge. In considering whether a measure was reasonable, a court had to balance parliamentary autonomy with the right of the public to participate in public affairs. The test to be applied was not only whether the limitation was proportionate to the end sought to be achieved, but also whether other measures would better achieve that end or would do so without limiting other people's rights. That was the test in the limitations provision in the Constitution (s 36(1)(e) – dealing with less restrictive means to achieve the purpose). In determining the reasonableness of a limitation insofar as an administrative decision was concerned, where the power conferred identified a goal to be achieved, but did not dictate the method of achieving it, a court had to pay due respect to the route chosen by the decision-maker.

The public had an interest in knowing about incidents of grave disorder. It had the right to know who caused it and who regulated it. The disorderly conduct of MP's, public representatives of the people, was a matter of public concern. It was not only proper behaviour that was of concern. Even loud, rowdy and fractious political life was good for democracy. Members of the public had the

right to see and hear elected members of Parliament misbehave.

• See law reports 'Parliament' 2015 (Oct) DR 43.

Constitutional litigation

Discretion of the High Court to make adverse costs order against private litigant so as to prevent abuse of court process:

The facts in *Lawyers for Human Rights v Minister in the Presidency and Others* 2017 (1) SA 645 (CC) were that in May 2015 and after attacks on non-South Africans in several parts of the country, the police and army launched large-scale operations in terms of which they cordoned off areas to conduct search-and-arrest operations, carrying out multiple raids in the process. In Johannesburg, search-and-arrest operations were carried out in private homes in the early hours of the morning, during which scores of people were arrested. The raids were done without warrants. The applicant Lawyers for Human Rights (the LHR), representing most of those arrested, challenged the constitutionality of the operation, and particularly the manner in which it was carried out, more so that it was done without a warrant. However, the manner in which the applicant mounted the challenge created problems as it approached the High Court by way of urgent application some six weeks after completion of the operation. The state parties, the respondents, being four ministers and high ranking officials in their departments, were given one day within which to file opposing papers.

The GP, per Hiemstra AJ, struck the application from the roll with costs, holding that it was gravely inappropriate to bring the application on an urgent basis. Leave to appeal was refused with costs. Thereafter, the applicant applied to the SCA for leave to appeal against the costs order only. The application was dismissed with costs. As a result the applicant sought the leave of the CC to appeal to it. Leave was

granted but the appeal itself dismissed with no order as to costs, the court holding that the leave to appeal application had been made properly without acting frivolously or inappropriately.

In a unanimous judgment the court held that in constitutional litigation the general rule was not to award costs against unsuccessful litigants when they were litigating against state parties and the matter was of genuine constitutional import. That general rule applied not only to costs orders on the merits, but also to ancillary issues and points. This was so as the threat of hefty costs orders could chill constitutional assertiveness and discourage parties from challenging questionable practices of the state. Parties seeking to ventilate important constitutional principles should not be discouraged by the risk of having to pay costs of the state adversaries merely because the court held adversely to them.

However, constitutional litigation was not risk free. The court, in its discretion, could order costs against a private litigant if the constitutional grounds of attack were frivolous or vexatious or if the litigant acted from improper motives or if there were other circumstances that made it in the interests of justice to make such a costs order since the court controlled its process. Although, in this case, the issues raised by the applicant could in other circumstances have protected it if it lost the litigation, bringing the application six weeks after completion of the operation, and giving government parties barely a day in which to respond, was not justified. It was not proper. A worthy cause or motive could not immunise a litigant from a judicially considered, discretionary imposed adverse costs order.

Consumer protection

Strict liability of the supplier arises if there is a supplier and consumer relationship between the parties: Section 61(1) of the Consumer Pro-

tection Act 68 of 2008 (the Act) provides among others that the producer, importer, distributor or retailer of any goods is liable for any harm caused wholly or partly as a consequence of supplying any unsafe goods, a product failure, defect or hazard in any goods or inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods, irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.

In *Eskom Holdings Ltd v Halstead-Cleak* 2017 (1) SA 333 (SCA) the respondent Halstead-Cleak suffered severe electrical burns when he came into contact with a low-hanging live electrical power line while cycling with friends. The power line hung low due to interference by vandals. The issue before the court was whether the appellant Eskom Holdings

attracted liability in terms of s 61 of the Act in those circumstances, more so that the respondent was not injured by electricity, which he was receiving from the appellant in terms of a supplier and consumer agreement.

At the trial of the action the parties agreed for separation of issues with the result that the trial proceeded only on the issue of liability of the appellant in terms of s 61(1) while the remaining issues stood over for determination at a later stage, if necessary. The GP held that the appellant was 100% liable for damage suffered by the respondent, hence the appeal to the SCA. The appeal was upheld with costs and the matter remitted to the High Court for trial of the other issues.

Schoeman AJA (Lewis, Willis JJA, Fourie and Makgoka AJJA concurring) held that the High Court lost sight of the fact that there should be a supplier and consumer relationship for the appellant to be strictly liable for harm

as the purpose of the Act was to protect consumers. In this case, the respondent was not a consumer *vis-à-vis* the appellant as he did not enter into any transaction with it as a supplier or producer of electricity in the ordinary course of its business. Furthermore, the respondent was not utilising electricity, nor was he a recipient or beneficiary thereof when he got injured. The supply of unsafe product, electricity in this case, also presupposed that the appellant sold it in the ordinary course of business for consideration, which was not the position here. The application of s 61(1) was restricted to a supplier and consumer relationship. In the present case the respondent was not utilising the electricity when he was injured. Accordingly, the respondent was not a consumer that was entitled to the protection of the Act. This was particularly so as the circumstances of the case fell outside the ambit of a consumer and supplier relation-

ship to which the Act applied.

• See law reports 'Consumer Protection Act' 2016 (May) *DR* 34.

Divorce

Non-member of a pension fund is entitled to pension benefits even if they are not mentioned in the divorce order: Section 7(7)(a) of the Divorce Act 70 of 1979 (the Act) provides among others that in the determination of patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall be deemed to be part of his assets. In *GN v JN* 2017 (1) SA 342 (SCA) the parties were married in community of property. When a decree of divorce was granted by the regional court in 2012, a settlement agreement was made an order of court. The agreement made provision for equal division of immovable and movable property in the joint estate but did not say anything about pension benefits. When



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division of the joint estate was not forthcoming the wife approached the GP for an order appointing a liquidator to divide the joint estate, as well as for an order declaring that each spouse was entitled to half of the other's pension interest. The husband opposed the application on the basis that in her divorce proceedings his former wife did not claim for his pension benefits, the settlement agreement did not mention such benefits and also the divorce order did not mention them. Kgomo J dismissed the application. An appeal against the High Court order was upheld with costs by the SCA.

Petse JA (Mpati AP and Swain JA concurring while Makgoka AJA, in whose judgment Seriti JA concurred, dissented) held that s 7(7)(a) of the Act was self-contained and was not subject to s 7(8), which dealt with endorsement of pension interest after the granting of the decree of divorce. The section deemed a pension interest to be part of the joint estate for the limited purpose of determining the patrimonial benefits to which the parties were entitled as at the time of divorce. It would be inimical to the scheme and purpose of s 7(7)(a) if it only applied if the court granting a decree of divorce made a declaration that in the determination of the patrimonial benefits to which the parties to a divorce action would be entitled, the pension interest of a party would be deemed part of his or her assets. It was not necessary for the parties to mention in their settlement agreement what was obvious, namely, that their respective pension interests were part of their joint assets which they agreed would be shared equally between them.

By inserting s 7(7)(a) in the Act, the legislature intended to enhance the patrimonial benefits of the non-member spouse over that which – prior to its insertion – had been available under the common law. The language of the section was clear and unequivocal. It created a fiction that a pension interest of a party became an integral part of the joint estate on divorce, which

was to be shared between the parties.

NB: The case is reported in South African Law Reports as *GN v JN*, whereas, in the All South African Law Reports it is *Ndaba v Ndaba* [2017] 1 All SA 33 (SCA). A quick glance may not reveal that it is the same case.

Environmental law

Protection of state against claims when acting lawfully, without negligence or in good faith: Section 49 of the National Environmental Management Act 107 of 1998 (NEMA) provides among others that neither the state nor any other person is liable for any damage or loss caused by the exercise of any power or the performance of any duty under the Act or any specific environmental management Act unless the exercise or failure to perform the duty was unlawful, negligent or in bad faith. Any specific environmental Act includes Environmental Conservation Act 73 of 1989 (ECA), which in s 34(1) provides among others that if in terms of its provisions limitations were placed on the purposes for which land could be used or on activities which may be undertaken on the land, the owner of such land shall have a right to recover compensation from the Minister or competent authority concerned in respect of actual loss suffered by him consequent on the application of such limitations. A related s 37 of ECA provides that no person, including the state, shall be liable in respect of anything done in good faith in the exercise of a power or the performance of a duty conferred or imposed in terms of ECA.

In *Minister of Water and Environmental Affairs and Another v Really Useful Investments No 219 (Pty) Ltd and Another* 2017 (1) SA 505 (SCA), [2017] 1 All SA 14 (SCA) the first appellant, Really Useful Investments (RUI), was the owner of land located along a river in Hout Bay, Cape Town. The land was subdivided into several properties for development as residential units. Because the land was located in a low-

lying area, RUI raised the level to four metres above sea-level by dumping rubble and also by landfill. When the second respondent, the City of Cape Town (the City) came to know of the activities of RUI, it directed it to restore the land to what it once was by removing the rubble, soil and landfill to the flood-line level and wetland state, bearing the costs thereof. That was duly done after which RUI sought compensation from the City, the first appellant the Minister of Water and Environmental Affairs, as well as the relevant Member of the Executive Council (MEC) for the Western Cape. All three raised an exception to RUI's particulars of claim as disclosing no cause of action in that it was not alleged that in the exercise of its powers in terms of s 31A of ECA the City had acted unlawfully, negligently or in bad faith. The three separate actions were consolidated, after which the WCC per Savage J dismissed the exception. An appeal against dismissal of the exception was upheld with costs.

Navsa JA (Wallis, Dambuza, Mocumie JJA and Dlodlo AJA concurring) held that it was not the case that in all instances in which potentially harmful activities on land were restricted that compensation would inevitably be payable. If that were so a refusal of authorisation for activities which could have a substantial detrimental effect on the environment, related for example to waste removal or chemical processes would automatically entitle a holder of a right in land to compensation. It was not the case that a person seeking to use his land, adjacent to a residential area, for a manufacturing process that will emit noxious gases in the area, would claim compensation in the event of a refusal of authorisation for him to do so. Put differently, it was difficult to conceive of a right to compensation for restrictions being put in place to prohibit dangerous process.

To interpret and apply s 34 of ECA to allow for such compensation would be to discourage environmental authorities from fulfilling their

constitutional obligation to protect the environment and put people first in applying the environmental management principles set out in NEMA. It would, perversely, encourage land owners to act in an environmentally offensive manner so as to solicit compensation. That would fly in the face of the common law and also lead to absurdity. The power under s 31A(2) to cause harmful conduct to be remedied was a power to compel the landowner to do so at its own expense. It was incongruous in the extreme that having done so at own expense, it could then turn around and say that it was entitled to compensation for loss suffered by it, which would include that self-same expense. That was the position, even if as a result the land became less valuable. In exercising its powers under s 31A(1) of ECA, the City was complying with its constitutional and statutory obligations to prevent harm to the environment. RUI's case as pleaded disclosed no cause of action as the actions taken by the City in issuing a directive in terms of s 31A did not fall within the purview of s 34.

Estate agents

An estate agent is required to have a valid Fidelity Fund Certificate to claim commission for work done: Section 34A of the Estate Agency Affairs Act 112 of 1976 (the Act) provides among others that no estate agent shall be entitled to any remuneration or other payment in respect of or arising from the performance of any duties of an estate agent, unless at the time of the performance of the act a valid Fidelity Fund Certificate (FFC) has been issued to such estate agent and if such estate agent is a company, the FFC was also issued to every director of such company. In *Crous International (Pty) Ltd v Printing Industries Federation of South Africa* [2017] 1 All SA 146 (GJ) the plaintiff, Crous International, sold the defendant Printing Industries Federation's property to the buyer African Leadership Academy (ALA). Thereafter, the defendant refused to

pay the agreed remuneration (commission) contending that the main issue was that as the buyer was an already existing tenant of the property, the plaintiff had not introduced it. In other words, the contention was that the plaintiff was not the effective cause of the sale. Secondly, the defendant also contended that the plaintiff was not entitled to remuneration as at the time of the sale, the plaintiff was not issued with (in possession of) a FFC. At the time the plaintiff had in fact successfully applied for the certificate but due to a technical error the Estate Agency Affairs Board (the Board) could not print it. Nevertheless, the certificates for the plaintiff's directors had been printed and issued to them.

Coppin J upheld the plaintiff's claim for remuneration with costs, holding that the plaintiff had established on a balance of probabilities that it carried out the terms of its mandate to find a buyer for the property, being ALA, and that it was the effective cause of the sale between ALA and the defendant. However, the mere fact that the plaintiff fulfilled its mandate and was the effective cause of the sale did not entitle it to be paid the agreed commission. In terms of s 26 of the Act, read together with s 34A, the plaintiff would be entitled to the commission if at the time of performing the acts as an estate agent those sections had been complied with regarding the issue of FFC. A strict, narrow textual or literal approach was not apposite to achieving that objective. A more purposive or substantive approach was called for. If the purpose of those provisions had been achieved, the sections would substantially have been complied with.

The evidence in the case was that the plaintiff had complied with all of the provisions of the Act. There was, therefore, no reason at all why certificates for the relevant period should not have been issued to the plaintiff by the Board, save for the fact that the Board had not been able to print them. One could, therefore, conclude that there had been compliance with

ss 26 and 34A of the Act even though the certificates were not issued to the plaintiff company itself due to the printing difficulty experienced by the Board. In substance, though not in form, the plaintiff was authorised by the Board to perform acts as an estate agent for payment.

Eviction of foreign nationals

Foreign nationals are eligible for temporary emergency accommodation: Section 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) provides among others that if an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier.

The issue in *Chapelgate Properties 1022 CC v Unlawful Occupiers of Erf 644 Kew and Another* 2017 (1) SA 403 (GJ); [2016] 3 All SA 508 (GJ) was whether the second respondent, the City of Johannesburg (the municipality), was under an obligation to provide temporary emergency accommodation to the respondents, the unlawful occupiers of property belonging to the applicant Chapelgate Properties. The majority of the respondents (the evictees), being some 60% of them, were not South African citizens and were almost all illegal foreigners as they did not have valid papers, or any papers at all in some instances, to be in the country. The court granted the eviction order with no order as to costs. In accordance with the provisions of s 4(12) of PIE the eviction order was made subject to conditions in terms of which the municipality was required to provide tempo-

rary emergency accommodation to eligible (needy) evictees on condition that by a specified date they provided proof to the municipality that their stay in South Africa had been regularised (meaning that their papers were in order) or that they had applied for asylum, which process was underway.

Spilg J held that illegal foreigners could not *per se* be precluded from being provided with temporary emergency housing while in dire situation. Nevertheless, where emergency assistance was to be provided to an illegal foreigner it remained subject to conditions prescribed by the Department of Home Affairs on a case-by-case basis. Until an illegal foreigner's status was determined and until lawful detention or deportation he or she was entitled, while in the country, to the benefits accorded to any citizen of temporary emergency shelter. In considering the plight of illegal foreigners subject to eviction under PIE read with s 26(3) of the Constitution (progressive realisation of the right of access to adequate housing), the provision of temporary emergency housing would not become the gateway to securing for them access to an incrementally progressive housing programme unless their status changed. In the present case it appeared reasonable to impose a condition that those

respondents who were illegal foreigners had to regularise their status, with a proviso that it they did not produce proof to that effect within a specified period which the court considered reasonable, the municipality could apply for a declaratory order that they were no longer entitled to receive temporary emergency accommodation.

Labour law

Compensation as remedy for unfair dismissal: In *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC) two employees of the applicant South African Revenue Service (Sars), being Kruger and Mboweni, had an altercation on two occasions in July and August 2007 after which Kruger hurled racial insults at Mboweni, his superior, calling him the 'k' word. Kruger was alleged to have said that he could not understand how 'k' thought and that a 'k' could not tell him what to do. Calling a person the 'k' word was derogatory, dehumanising and effectively meant that such a person was a baboon, was lazy and could not think. Kruger was taken to a disciplinary inquiry to face charges of misconduct in using racist remarks or alternatively using derogatory and abusive language towards

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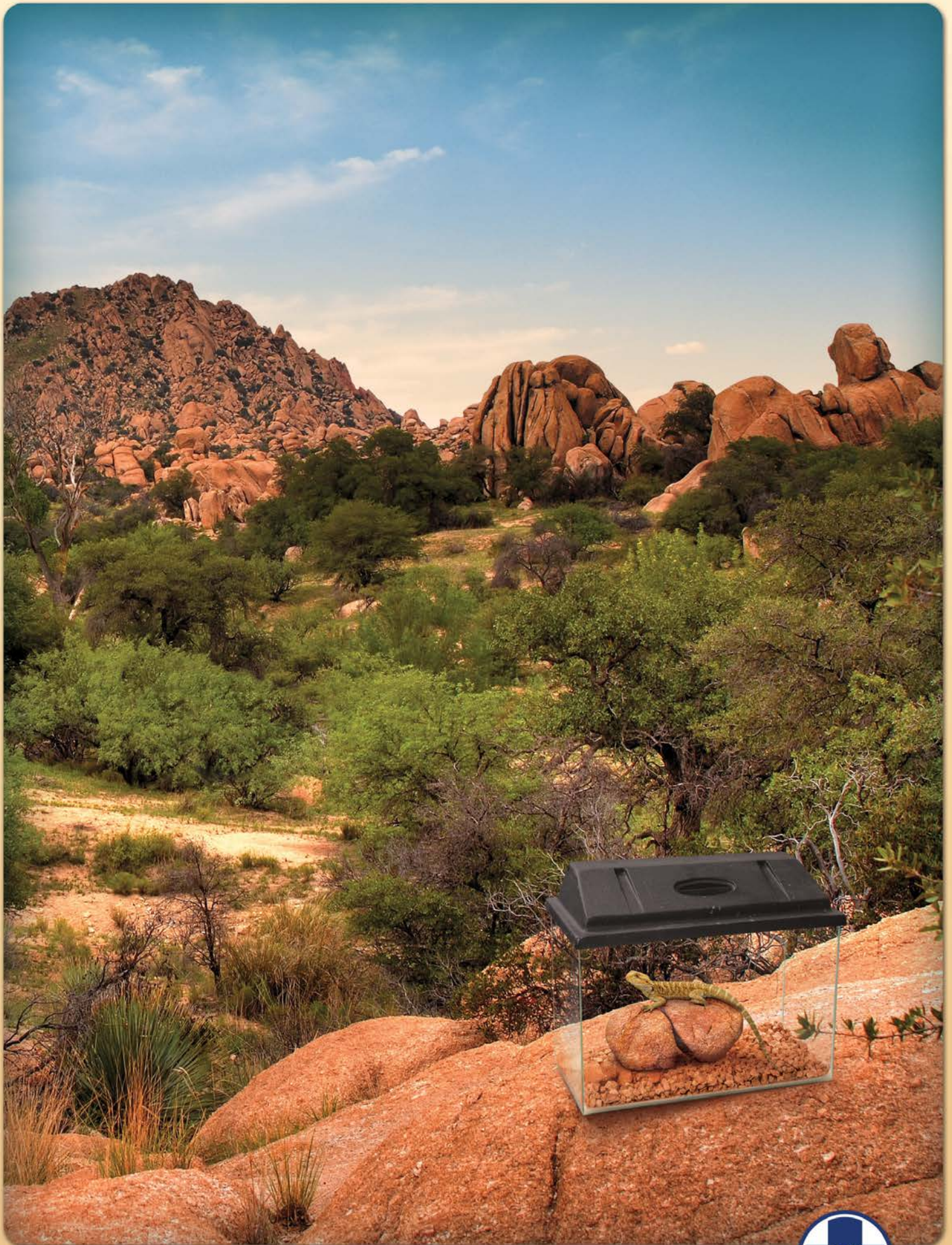
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his team leader, Mboweni. Kruger pleaded guilty to the charges and a deal was struck in terms of which he received a very favourable sanction of final written warning, which was valid for six months, was suspended from work without pay for ten days and furthermore he had to undergo counselling. On receipt of the report on the outcome of the disciplinary inquiry the Sars Commissioner changed the decision from final written warning to dismissal. In making that change Kruger was not afforded the opportunity to contest the appropriateness of the dismissal sanction. Aggrieved by the dismissal Kruger took the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) where the arbitrator held that the Sars Commissioner did not have authority to change the decision of the disciplinary inquiry. On that basis alone the dismissal was held to have been unfair. Kruger was reinstated to his position. A review application against the CCMA award to both the LC and the LAC was unsuccessful.

As a result the applicant sought leave of the CC to appeal against the decision of the LAC. That leave was granted and the appeal upheld. Kruger was dismissed but received compensation equal to six months' pay, as per agreement with the applicant. Each party was ordered to pay own costs as both had achieved substantial success, being reversal of reinstatement in the case of the applicant and en-

titlement to compensation on the part of Kruger. Moreover, it was because of the errors of the applicant that the matter had to proceed all the way to the CC.

Reading a unanimous judgment of the court Mogoeng CJ held that an arbitration award issued by the CCMA arbitrator in dismissal disputes constituted an administrative action which s 33(1) of the Constitution required to be lawful, reasonable and procedurally fair. Unreasonableness was one of the grounds on which an arbitrator's award, issued under the auspices of the CCMA, could be reviewed and set aside. In this case, by ordering the applicant to reinstate Kruger the arbitrator acted unreasonably. She also did not appear to have been mindful of the fact that in terms of s 193(2) of the Labour Relations Act 66 of 1995, reinstatement would not follow as a matter of course. It would in fact not be an option if circumstances surrounding the dismissal were such that a continued employment relationship would be intolerable. No reasonable arbitrator could have ordered reinstatement. Accordingly, the reinstatement part of the arbitrator's award was unreasonable and had to be reviewed and set aside.

Turning to the question of compensation the court held that generally speaking, an unfair dismissal ought to earn an employee compensation where reinstatement was not feasible by reason of the intolerability of the continued working relationship.

The applicant had offered Kruger compensation for his unfair dismissal. However, compensation was not automatic as it was a discretionary exercise. A whole range of factors had to be taken into account to determine whether compensation had to be paid and if so, for how many months. One of the key considerations was the need to ensure that employers were not inadvertently encouraged by the non-payment of compensation to adopt a shotgun approach of dismissing employees without affording them the opportunity to be heard. Compensation was a just and equitable remedy that was appropriate in the case. Moreover, the applicant had reconciled itself with the possibility of payment of up to six months. But for the applicant's offer and a series of blunders, compensation for a lesser period or no compensation at all would arguably have been more appropriate. Compensation equivalent to six months' pay for misconduct as gross as that of Kruger and the lies he told the arbitrator as the CCMA disciplinary inquiry was by any standard generous.

• See employment law update 'An arbitrator's duty when awarding a remedy' 2017 (Jan/Feb) *DR* 52.

Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with: Application for postponement of civil trial,

defamatory postings on social media account, deponent to have personal knowledge of facts deposed to, disallowing second medical examination by similar expert, discovery of documents in motion proceedings, discretion of court to grant rescission of default judgment, eviction of unlawful occupiers of land if it is just and equitable to do so, experts who were not called to testify not being entitled to a fee, interlocutory order not being appealable, legality of declaration of national road as toll road, no legal duty on third parties not to infringe trading rights between contracting parties, non-disclosure of private deliberations on judicial appointments, objections to a liquidation and distribution account first to be made to the Master, order implementing judgment pending appeal available only in exceptional circumstances, prohibition of use of property contrary to title deed restriction, reasonableness of steps taken to avoid injury to other persons, reviewing and setting aside of final report of Public Protector, right of shareholder to demand that company take legal action and tariffs payable for transportation of crude oil.

Erratum

In law reports 'Marriage: Waiver of maintenance' 2017 (Jan/Feb) *DR* 42, we referred to Weinkove AJ as Weinkove J. We apologise for any inconvenience caused.



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Review of arbitration awards due to an arbitrator's misconduct

Premier Foods (Pty) Ltd (Nelspruit) v CCMA and Others
(LC) (unreported case no JR2103/12, 8-11-2016) (Snyman AJ)

The determination when dealing with review grounds as provided in s 145(2) of the Labour Relations Act 66 of 1995 (LRA) was summarised in *Baur Research CC v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 1528 (LC) at para 18 as follows:

'What this means is that where it comes to an arbitrator acting *ultra vires* his or her powers or committing misconduct that would deprive a party of a fair hearing, the issue of a reasonable outcome is simply not relevant. In such instances, the reviewable defect is found in the actual existence of the statutory prescribed review ground itself and if it exists, the award cannot be sustained, no matter what the outcome may or may not have been. Examples of this are where the arbitrator should have afforded legal representation but did not or where the arbitrator conducted himself or herself during the course of the arbitration in such a manner so as to constitute bias or prevent a party from properly stating its case or depriving a party of a fair hearing. The reason for reasonable outcome not being an issue is that these kinds of defects deprive a party of procedural fairness, which is something different from the concept of process related irregularity.'

Further in the case of *Naraindath v Commission for Conciliation, Mediation and Arbitration and Others* (2000) 21 ILJ 1151 (LC) at para 27 the court held:

'A failure to conduct arbitration proceedings in a fair manner, where that has the effect that one of the parties does not receive a fair hearing of their case, will almost inevitably mean either that the commissioner has committed misconduct in relation to his or her duties as an arbitrator or that the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.'

Facts

The third respondent had been dismissed by the applicant on 2 May 2012 for misconduct. The third respondent then referred an unfair dismissal dispute to the Commission of Conciliation, Mediation and Arbitration (CCMA).

The matter was set down for con-arb on 12 June 2012 and came before the second respondent. The second re-

spondent, after hearing each of the parties' respective opening submissions, proceeded with conciliation to try and settle the matter, which was to no avail.

When proceedings resumed, on record, the applicant attempted to move an application for the recusal of the second respondent. This recusal application was based on statements the second respondent had made to the applicant's representative in the course of the settlement discussions in conciliation about the evidence in the case and the applicant's prospects of success. The second respondent, however, refused to hear the application and proceeded with the arbitration.

The applicant not satisfied with the second respondent's conduct then approached the Labour Court (LC) to review and set aside the arbitration award.

LC's judgment

Snyman AJ noted that it was entirely inappropriate for the second respondent to have derailed the recusal application in the way in which he did. He failed to allow the applicant to properly argue and motivate the application. He had provided, without hearing the applicant's argument that he was going to interrupt the applicant and that there were no grounds for his recusal.

Snyman AJ noted further that as the second respondent was confronted with a recusal application, he had to decide it in line with the relevant principles applicable to said applications.

Snyman AJ provided that the second respondent became involved in the conciliation part of the process in excess of what would be considered to be proper to still allow him to conduct the arbitration, without a perception of impartiality. But more importantly, the second respondent gave advice to the applicant and told the applicant what he considered the applicant's prospects were, being that the applicant would lose. This was not appropriate, entirely irregular behaviour, and constituted misconduct.

Snyman AJ provided further that the second respondent had an opportunity to remedy the matter when the applicant raised his concern by bringing a recusal application. From a perspective of conducting himself ethically and responsibly, the second respondent should have recused himself, once this con-

cern was raised. But instead, he placed the requirement of expeditious dispute resolution above all else, to the extent of even not allowing the applicant to properly raise the concern. This constituted misconduct by the second respondent in conducting the arbitration proceedings, and vitiated the entire proceedings rendering it a nullity.

The court concluded that the events that took place during the conciliation process of the con-arb proceedings and specifically the way in which the second respondent had become involved in the conciliation and the views he expressed, had deprived the applicant of a lawful, reasonable and procedurally fair hearing in the arbitration that followed. The matter was aggravated by the way in which the second respondent arbitrarily disposed of the issues raised by the applicant in the form of a recusal application, and then recorded in his award that the arbitration proceeded by agreement, which was incorrect. This constituted an arbitrator's misconduct as contemplated by s 145(2)(a)(i) of the LRA.

The court accordingly reviewed and set aside the arbitration award made by the second respondent. The court further ordered that the dispute be remitted back to the CCMA for a *de novo* arbitration hearing, before an arbitrator other than the second respondent.

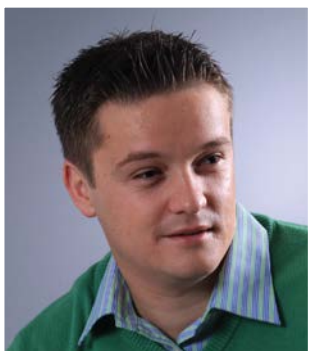
Conclusion

This judgment is important as it highlights that the following grounds constitutes misconduct on the part of arbitrators –

- discussing evidence and advising parties on their meek prospects of success during conciliation;
- failing to properly hear an application for recusal; and
- making an incorrect note on an arbitration award that proceedings continued by agreement after refusing to properly hear an application for recusal.

The above grounds may be used by an aggrieved party in support of an application made to the LC to have the arbitration award reviewed and set aside.

Yashin Bridgemohan LLB (UKZN) PG DIP Labour Law (NWU) is an attorney at Yashin Bridgemohan Attorney in Pietermaritzburg. □



Philip Stoop *BCom LLM (UP) LLD (Unisa)* is an associate professor in the department of mercantile law at Unisa.

Bills introduced

Criminal Procedure Amendment Bill B2 of 2017.

Road Accident Fund Amendment Bill B3 of 2017.

Financial Intelligence Centre Amendment Bill B33C of 2015.

Financial Intelligence Centre Amendment Bill B33D of 2015.

Cybercrimes and Cybersecurity Bill B6 of 2017.

Appropriation Bill B5 of 2017.

Division of Revenue Bill B4 of 2017.

Selected list of delegated legislation

Agricultural Pests Act 36 of 1983

Amendment of regulations. GN R134 GG40622/17-2-2017.

Amendment of Control Measures. GN R133 GG40622/17-2-2017.

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Rules, forms and particulars to be furnished in terms of the Act. GN117 GG40612/10-2-2017.

Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947

Amendment of the regulations relating to the tariffs for the registration of fertilizers, farm feeds, agricultural remedies, stock remedies, sterilizing plants and pest control operators, appeals and imports. GN122 GG40621/17-2-2017.

Financial Markets Act 19 of 2012

ZAR X exchange rules. BN12 GG40637/24-2-2017.

Income Tax Act 58 of 1962

Agreement between South Africa and Saint Christopher (Saint Kitts) and Nevis for the exchange of information relating to tax matters. GN113 GG40610/10-2-2017 (also available in Afrikaans).

Legal Practice Act 28 of 2014

Code of Conduct for legal practitioners, candidate legal practitioners and juristic entities (the Code is not yet in force). GN81 GG40610/10-2-2017.

New legislation

Legislation published from
1 – 28 February 2017

Local Government: Municipal Finance Management Act 56 of 2003

Exemption from regs 15 and 18 of the Municipal Regulations on Minimum Competency Levels, 2007. GN91 GG40593/3-2-2017.

Long-term Insurance Act 52 of 1998

Penalty for failure to furnish the Registrar with certain information. BN14 GG40637/24-2-2017.

Medicines and Related Substances Act 101 of 1965

Unlicensed manufacturers, distributors and wholesalers of medical devices and in vitro diagnostics to apply for licences in terms of the Act and the Regulations relating to medical devices and in vitro diagnostics. GN157 GG40637/24-2-2017.

National Water Act 36 of 1998

Regulations requiring that the taking of water for irrigation purposes be measured, recorded and reported. GenN131 GG40621/17-2-2017.

Occupational Health and Safety Act 85 of 1993

Incorporation of the Code of Practice for existing goods hoists installation into the Lift, Escalator and Passenger Conveyor Regulations, 2010. GN R94 GG40594/3-2-2017.

Plant Breeders' Rights Act 15 of 1976

Amendment of the regulations relating to plant breeders' rights. GN121 GG40621/17-2-2017.

Second-Hand Goods Act 6 of 2009

Extension of police powers in terms of the Act to persons employed as law enforcement officers by the City of Cape Town. GN120 GG40616/14-2-2017.

Short-term Insurance Act 53 of 1998

Penalty for failure to furnish the Registrar with returns etc. BN13 GG40637/24-2-2017.

Small Claims Courts Act 61 of 1984

Establishment of a small claims court for the area of Delareyville. GN88 GG40593/3-2-2017.

Draft delegated legislation

Cultural Heritage Survey Guidelines and Assessment Tools for Protected Areas in terms of the National Environmental Management: Protected Areas Act 57 of 2003 for comment. GN83 GG40593/3-2-2017.

Draft amendments to the regulations

issued in terms of s 36 of the Pension Funds Act 24 of 1956. GN90 GG40593/3-2-2017.

Prohibition of the powdering or shaving of rhino horn, the domestic selling or trading in, giving, donating, buying, receiving, accepting a gift or donation, or disposing or acquiring of powdered or shaved rhino horn, and the export thereof in terms of the National Environmental Management: Biodiversity Act 10 of 2004 for comment. GenN77 GG40601/8-2-2017.

Proposed amendment of the invasive species list and proposed listing of species that are threatened or protected, restricted activities that are prohibited and exemptions from restriction in terms of the National Environmental Management: Biodiversity Act 10 of 2004. GenN76 GG40601/8-2-2017.

Draft norms and standards for the management and monitoring of the hunting of leopard in South Africa for trophy hunting purposes in terms of the National Environmental Management: Biodiversity Act 10 of 2004 for comment. GenN75 GG40601/8-2-2017.

Draft regulations for the domestic trade in rhino horn or a part, product or derivative of rhino horn in terms of the National Environmental Management: Biodiversity Act 10 of 2004. GenN74 GG40601/8-2-2017.

Draft Ballast Water Management Bill, 2017. GenN111 GG40614/10-2-2017.

Draft National Education Policy on Recognition and Evaluation of Qualifications for Employment in Education in terms of the National Education Policy Act 27 of 1996. GN R108 GG40610/10-2-2017.

Draft Policy on White Shark Cage Diving in terms of the Marine Living Resources Act 18 of 1998. GN146 GG40626/17-2-2017.

Draft Policy on Boat-Based Whale and Dolphin Watching in terms of the Marine Living Resources Act 18 of 1998. GN145 GG40626/17-2-2017.

Incorporation of the Code of Practice for zip lines into the Driven Machinery Regulations, 2015 in terms of the Occupational Health and Safety Act 85 of 1993 for comment. GN R136 GG40622/17-2-2017.

Draft regulations for the manner and procedure for dealing and lodging tourism complaints in terms of the Tourism

Act 3 of 2014 for comments. GenN146 GG40637/24-2-2017.

Regulations relating to the registration of technicians in clinical technology in terms of the Health Professions Act 56 of 1974 for comment. GN156 GG40637/24-2-2017.

Draft Reclamation of Land from Coastal Waters Regulations, 2017 in terms of the National Environmental Management: Integrated Coastal Management Act 24 of 2008. GN R167 GG40638/24-2-2017.

Municipal tariff guideline increase, benchmarks and proposed timeline

for the municipal tariff approval process for the 2017/18 financial year in terms of the National Energy Regulator Act 40 of 2004 for comment. GenN163 GG40653/28-2-2017.



Monique Jefferson BA (Wits) LLB (Rhodes) is an attorney at Bowman Gilfillan in Johannesburg.

Balancing of employee's right to privacy against employer's right to protect confidential information

In *National Union of Metalworkers of South Africa v Rafee NO* [2017] 2 BLLR 146 (LC), the employee took photographs of the employer's production line. When the employer found out about this the employee was given a verbal warning that he was not permitted to take photographs. He was furthermore, instructed to delete the photographs that he had taken and to hand over his cellphone so that the employer could check that the photographs had been deleted. The employee refused to hand over the phone on the basis that it was his private property and that he was entitled to take photographs. After refusing to hand over the phone four times he was suspended and called to a disciplinary hearing. The employee was found guilty and dismissed for the failure to delete photographs of the employer's production line and refusing to hand over the phone so that management could ensure that the photographs had been deleted.

The employee referred an unfair dismissal claim to arbitration. During the arbitration the employee argued that he had not taken any photographs. The arbitrator found that the employer's instruction to hand over the phone had been reasonable in the circumstances and thus the dismissal was fair.

The employee then reviewed the arbitrator's decision alleging that the arbitrator failed to take into account the fact that the phone contained private and confidential information pertaining

to the employee and that the employer intended infringing his constitutional right to privacy and to lawful possession of his property. The Labour Court (LC) per Lagrange J found that there was no infringement of the employee's right to possession of property as the employer had not demonstrated an intention to confiscate the phone. As regards the right to privacy, the court found that this right is not absolute and that in the employment context there must be a balancing of the employee's right to privacy against the employer's right to protect its business interests. It was found that taking photographs of the production line was similar to copying plans of the production layout and thus constituted the employer's confidential information. It was found that the employee's conduct resulted in a breakdown in the trust relationship and that the arbitrator's finding that the dismissal was fair was reasonable. The review application was dismissed.

Employer's policy resulting in dismissal found to be substantively fair

In *Woolworths (Pty) Ltd v South African Commercial Catering and Allied Workers Union and Others* [2017] 2 BLLR 137 (LAC), an employee was dismissed after her till was found to have excess cash. The arbitrator found that dismissal was too harsh a sanction in the circumstances and thus the dismissal was substantively unfair. The employer was ordered to reinstate the employee. In making this finding, the arbitrator considered the fact that there were no irregularities detected and the reason for the excess was unknown. The arbitrator was accordingly of the view that the employee had not been negligent and there was no evidence that the employee was dishonest or wanted to benefit from the surplus. Furthermore, the employer had not suffered any loss.

On review, the employer argued before

the LC that the arbitrator committed a gross irregularity as he did not apply his mind to all the evidence before him, had failed to consider the previous till discrepancies, had concluded that the employee was not negligent and had imposed his own views on the employer's policies. The LC found that the arbitrator had reached a reasonable decision and dismissed the review application.

The employer appealed the LC's decision on the basis that the arbitrator's decision was unreasonable as he made findings that were not based on the evidence before him. In this regard, there was evidence before the arbitrator that there had been five previous till discrepancies and that the employee was on a final warning for the last till discrepancy. Furthermore, the evidence before the commissioner was that in terms of the employer's policy, in the event of till shortages and excesses above R 500 there would be a disciplinary inquiry and the appropriate sanction should be dismissal.

The Labour Appeal Court (LAC) found that the arbitrator had failed to appreciate –

- the nature and importance of the rule breached;
- the reason the sanction of dismissal was imposed;
- the basis of the employee's challenge to the dismissal; and
- whether the employee was likely to repeat the offence and her short length of service.

It was held that the arbitrator's finding that the dismissal was unfair was unreasonable. The appeal was upheld and the dismissal was found to be substantively fair.

Dismissal for gross insubordination upheld by LAC

In *Msunduzi Municipality v Hoskins* [2017] 2 BLLR 124 (LAC), a human resources support manager was dismissed

for 'gross insubordination, gross insolence and gross misconduct' as a result of him failing to obey the municipal manager's instruction that he desist from representing employees in disciplinary hearings. The employee argued that the employees had a constitutional right to be represented by a fellow employee and that there was no conflict between his role of employee representative in disciplinary hearings and his managerial position.

The bargaining council upheld the dismissal but on review the LC set aside the award on the basis that it found the sanction of dismissal too harsh in the circumstances. These circumstances included the fact that –

- the employee had long service with the employer;

- there was no evidence of similar misconduct in the past;
- the employee was over the age of 50 years, and thus unlikely to get another job; and
- there was no evidence that it would be impractical to reinstate the employee.

The LC replaced the arbitrator's award with an order of reinstatement coupled with a final written warning.

On appeal, the LAC found that the employee had challenged and seriously undermined the authority of the municipal manager. He had also posted a letter about the municipal manager on the notice board and distributed it to employees and a union of which he was not a member. In this letter the employee made it clear that he was not going to obey the instruction of the municipal

manager and dared the municipal manager to take further action against him. He continued to represent the employees in disregard of the instruction. He also showed no remorse at the arbitration.

The LAC was of the view that the arbitrator applied his mind to all the evidence before him and found that dismissal was the appropriate sanction given the seriousness of the insubordination and the lack of remorse. It was held that it was a reasonable decision and that the LC misdirected itself in finding that the employee deserved a second chance without advancing any reasons as to why this would be appropriate. The appeal was upheld.



Moksha Naidoo BA (Wits) LLB (UKZN) is an advocate at the Johannesburg Bar.

Question:

I would like to know if it is procedurally fair for an employer to charge you for misconduct after you lodged a grievance pertaining to the same fact which the employer is charging you for. If not, what is the recourse?

Answer:

The paucity of factual information in your question, particularity around the details of the grievance and the nature of the charge brought against the employee, prevents me from expressing a definitive view.

Nevertheless, I shall attempt to assist you and the readers in general by outlining circumstances wherein a dismissal subsequent to, and as a result of, an employee lodging a grievance would be deemed automatically unfair and thereafter, set out the context where a dismissal, under similar circumstances, would be deemed fair.

Automatically unfair dismissal

In *Mackay v Absa Group and Another* (2000) 21 ILJ 2054 (LC) the employee re-

ferred an automatically unfair dismissal, in terms of s 187(1)(d) of the Labour Relations Act 66 of 1995 (LRA), alleging he was dismissed as a result of lodging a grievance against his superior.

Section 187(1)(d) reads:

'A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is –

...

(d) that the employee took action, or indicated an intention to take action, against the employer by –

- exercising any right conferred by this Act or,
- participating in any proceedings in terms of this Act.'

On a plain reading of the above section, the question before the court was whether an agreed upon grievance procedure, found in either an employer's policy or in an employment contract, falls within the ambit of either a 'right' or 'proceedings' as contemplated in s 187(1)(d)(i) or (ii).

Adopting a purposive approach in interpreting the LRA and considering international charters, to which South Africa is a signatory to, Mlambo J held:

'Therefore in keeping with the main object of the Act, ie of resolving all labour disputes effectively, and with the constitutionally guaranteed right to fair labour practices it must follow that a purposive interpretation of s 187(1) would mean that the exercise of a right conferred by a private agreement binding on the employer and employee as well as participation in any proceeding provided for by such agreement was also contemplated in that section. As *in casu*, the participation by an employee in a privately agreed grievance procedure, must have been contemplated as a proceeding in terms of this Act, ie when s 187(1)(d) was enacted. This is on the basis that

the disputes specifically mentioned in s 187(1) are of the same kind as the dispute *in casu*.'

Subsequent to this judgment the Labour Court (LC) per Steenkamp J in *De Klerk v Cape Union Mart International (Pty) Ltd* (2012) 33 ILJ 2887 (LC), followed the principle in the *Mackay* case. The employee in that matter also relied on s 187(1)(d) when she was dismissed for lodging a grievance against her manager. The employer raised three exceptions against the employee's statement of claim, one being that s 187(1)(d) does not refer to a grievance as a 'right' contemplated in the LRA nor can a grievance be considered 'proceedings' envisaged in the LRA. In dismissing this ground the LC held:

'I am not persuaded that the purposive interpretation adopted by Mlambo J is clearly wrong. It does seem anomalous that an employee in the position of Ms de Klerk or Mr Mackay should not enjoy special protection. Why would a whistleblower enjoy special protection in terms of s 187(1)(h), but not an employee who lodges a grievance in terms of her own employer's procedures?

...

In the absence of any finding to the contrary by the LAC, I consider the interpretation adopted by Mlambo J to be sufficiently persuasive not to prevent the applicant from pursuing her claim in those terms. The interpretation in *Mackay* appears to me to give effect to the constitutional values discussed in the quoted passage. I am not in a position to disagree with the learned judge's finding on the legal position.'

Fair dismissal

However, should an employee lodge a grievance accusing a fellow employee or superior of serious misconduct which, when tested or investigated are deemed

false; then an employee making such accusations could well be disciplined and even fairly dismissed.

In *SACWU and Another v NCP Chlorchem (Pty) Ltd and Others* [2007] 7 BLLR 663 (LC) an employee was dismissed for falsely accusing his manager of being a racist. An arbitrator found his dismissal substantively fair and on review, the LC held the following:

'One can hardly think of many, if any, circumstances under which an employee who has been found guilty of being a racist or displaying racist attitudes to fellow employees will avoid being dismissed. This is likely to be so as one can hardly imagine that any employer could

reasonably be expected to continue to employ such offending employee in the workplace. It is likely to cause racial disharmony. I believe it is similarly difficult to imagine under what circumstances an employee who without just cause or a reasonable basis therefore, and accordingly unjustifiably, accuses another employee of being a racist, or that he or she was displaying a racist attitude, would easily escape dismissal. Such conduct strikes at the heart of racial harmony. It cannot be emphasised enough that to accuse somebody of being a racist, or of displaying racist attitudes, is to be regarded as a very serious allegation.'

While your question speaks to proce-

dural fairness, the primary inquiry in my view, turns on the substantive fairness of disciplining an employee after having lodged a grievance. If there were genuine grounds to lay the grievance and it can be shown, at a *prima facie* level, that dismissal was imposed with punitive intent, then the dismissal may well be automatically unfair. If, however, it is found that there was no reasonable basis for lodging a grievance and it was the employee who lodged the complaint with malicious intent, then dismissal under these circumstances may well be deemed fair.



By
Meryl
Federl

Recent articles and research

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Abbreviation	Title	Publisher	Volume/issue
<i>AHRLJ</i>	African Human Rights Law Journal	Pretoria University Law Press	(2016) 16.2
<i>DJ</i>	De Jure	University of Pretoria Law School	(2016) 49.2
<i>LitNet</i>	LitNet Akademies (Regte)	Trust vir Afrikaanse Onderwys	(2017) January (2017) February
<i>PER</i>	Potchefstroom Electronic Law Journal/ Potchefstroomse Elektroniese Regsblad	North West University, Faculty of Law	(2017) January

Child law

Abdulraheem-Mustapha, MA 'Child justice administration in the Nigerian Child Rights Act: Lessons from South Africa' (2016) 16.2 *AHRLJ* 435.

Buchner-Eveleigh, M 'Children's rights of access to health care services and to basic health care services: A critical analysis of case law, legislation and policy' (2016) 49.2 *DJ* 307.

Louw, A 'Revisiting the limping parental condition of unmarried fathers' (2016) 49.2 *DJ* 193.

Sloth-Nielsen, J and Hove, K '*Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others*: A review' (2016) 16.2 *AHRLJ* 554.

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between the position of child marriage "victims" and child soldiers: Towards a nuanced approach' (2016) 16.2 *AHRLJ* 458.

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Constitutional law

Ntlama, N 'The law of privilege and the Economic Freedom Fighters in South Africa's National Assembly: The aftermath of the 7th of May 2014 national elections' (2016) 49.2 *DJ* 213.

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Monyamane, PL 'Social security "benefits" and the collateral source rule - an analysis of the three Coughlan decisions' (2016) 49.2 *DJ* 326.

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Chauhan, R and Huneberg, S '*Cecil Sher and Another v Vermaak* (AR 197/13) [2014] ZAKZPHC 8 (25 February 2014)' (2016) 49.2 *DJ* 335.

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Others v MEC for the Department of Water Affairs, Gauteng and Others Case nr 40514/2013' (2017) January *PER*.

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Kuokkanen, T 'Water security and international law' (2017) January *PER*.

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Attah, CE 'Boko Haram and sexual terrorism: The conspiracy of silence of the Nigerian anti-terrorism laws' (2016) 16.2 *AHRLJ* 385.

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Smith, A 'MtGox Co., Ltd (Re), 2014 ONSC 5811' (2016) 49.2 *DJ* 346.

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Church, J '*Jerrier v Outsurance Insurance Company Limited* [2015] 3 All SA 701 (KZP)' (2016) 49.2 *DJ* 360.

International criminal law

Perez-Leon-Acevedo, JP 'Stopping mass atrocities in Africa and the Pretoria Principles: Triggering military intervention in Darfur (Sudan) and Libya under article 4(h) of the Constitutive Act of the African Union' (2016) 16.2 *AHRLJ* 476.

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Security law

Wiese, M 'Vonnisbespreking: Die (ongegronde) grondslag vir die klassifisering en werking van retensieregte in die Suid-Afrikaanse reg' (2017) January *LitNet*. Sentencing

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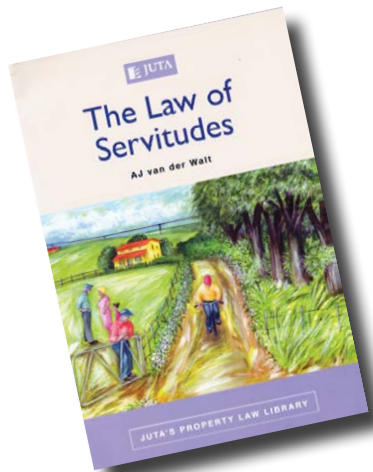
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The Law of Servitudes

By Andre van der Walt

Cape Town: Juta

(2016) 1st edition

Price: R 750 (incl VAT)

649 pages (soft cover)

A book of this nature dedicated exclusively to servitudes in South Africa was long overdue. The previous monograph to be dedicated exclusively to the law of servitudes was published as far back as 1973. Since then regulatory and constitutional issues have arisen, which made this book imperative. The book affords clear guidance on the nature of servitudes, the acquisition and termination thereof.

The author has gone to great lengths to update the reader with reference to the latest case law, new academic publications and, where relevant, new legislation. Case law, old and new, is extensively discussed and arguments for and against the cases provided.

Not only is the relevant South African law and legislation alluded to, for example the Deeds Registries Act 47 of 1937 and Sectional Titles Act 95 of 1986, but also related foreign law is discussed in suitable places, albeit very brief, but this makes for interesting reading.

In practice, I have personally experienced the confusion that exists pertaining to the nature of servitudes. Personal rights are often confused with personal servitudes and personal servitudes with public servitudes. The discussion on the characteristics of servitudes provides clear guidance as to whether the servitude is a preadial, personal or public servitude, and to this point it eradicates all uncertainty as to the register ability thereof.

The obligations of the usufructuary are also clearly expunged and the uncertainty as to who is liable for rates and taxes and levies on the bare dominium has been put to bed, given the necessary authority confirming that the usufructuary will be liable for such expenses.

This book in my view, is of equal benefit to all legal practitioners, conveyancers, academics, students and deeds office staff, the latter who, almost daily, are confronted with problems pertaining to the register ability of conditions, as well as the termination thereof. This book is also of importance to members of the public who wish to familiarise themselves with the law, practice and procedure relevant to servitudes. The book is also a convenient tool and guide to all who wishes to do research on servitudes. The author is to be commended for the meticulous attention paid to all relevant case law and legislation.

In summary, I conclude that this book is an instrumental treatise to establish the correct state of law on servitudes, seen in the context of its historical development in South Africa, as well as the effect of the constitution on the development of private law.

Allen West is an attorney at MacRobert Attorneys in Pretoria. ☐

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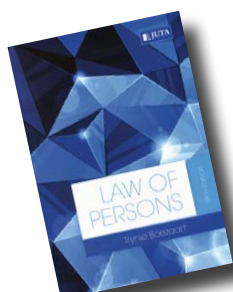
By Stephan Terblanche

Durban: LexisNexis

(2016) 3rd edition

Price R 855 (incl VAT)

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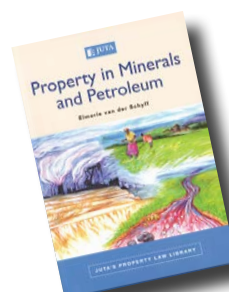
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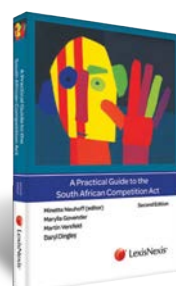
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